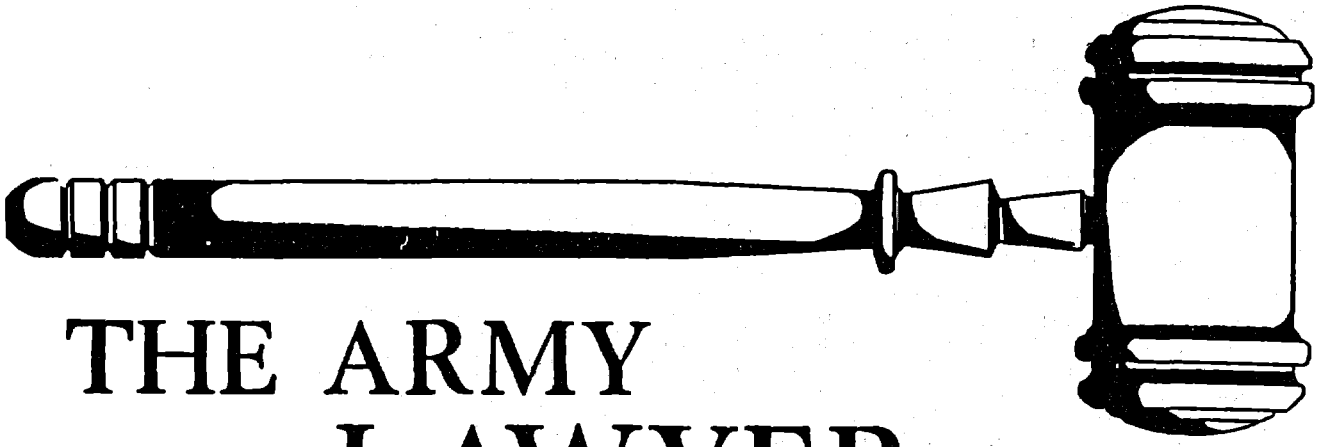

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Editor

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Dual Nationality: *Etes-Vous Francais?**

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Introduction

"Lafayette, we are here!" With such a flourish, American troops stepped ashore in France during 1917. Since that time, American soldiers have fought in France, have garrisoned in France, and have passed through France. Not surprisingly, many of those soldiers established relationships with French citizens that eventually led to the birth of children with mixed heritages. Accordingly, issues concerning these children's citizenship and dual nationality arise frequently, and legal practitioners must be prepared to address them.

This article will deal with problems of dual nationality in France. The subject is increasingly relevant because the United States had large numbers of troops stationed in France between 1945 and 1967. The children of relationships formed during that period are now in their late teens and twenties and may face some surprising and unpleasant consequences when they learn that they are French citizens.

Determinants of Citizenship

"Oh, your child was born in France. He must have dual nationality." This frequently repeated statement is far from the truth in France. Citizenship in France, as well as in the United States, is a matter of statutory law. The two traditional determinants of citizenship by birth in both France and the United States are place of birth and nationality of parents. Each country, however, applies these determinants in a different manner.

In the United States the traditional means of gaining American citizenship is either by birth in the United States or, if born outside the country, by birth to one or more parents of United States citizenship.[1] If born in the United States, the nationality of the parents normally is immaterial.[2] If born outside the United States, one of the parents must be a citizen of the United States and must have resided in the United States for a period of time. The period of time varies according to whether one or both of the parents are citizens.[3]

Acquisition of French citizenship, on the other hand, is more complicated than acquiring American citizenship. Mere birth in France does not automatically confer citizenship.[4] Rather, the citizen-to-be must satisfy other determining factors. A child born in France to non-French citizens normally does not acquire French citizenship;[5] therefore, the myth that a child born in France to an American parent must be a dual national is not true. A child born in France, however, subsequently may acquire French citizenship if he or she continues to reside in France for a period of five years. Then, if the parents desire the child to acquire French citizenship, they may have the child declared a French citizen.[6] Alternatively, if the child is born in France to non-French citizens and resides in France for the five years immediately preceding his or her eighteenth birthday, the child automatically will gain French citizenship on his or her eighteenth birthday.[7]

A child will acquire French citizenship regardless of the place of birth if one of the parents is a French citizen.[8] The requirement of physical residence in France for the parents or the child to maintain this citizenship simply does not exist. The French citizenship of a child born to a French citizen occurs automatically; no additional action on the part of the parents, such as declaring

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*Are you French?

[1] 8 U.S.C.A. § 1401 (West Supp. 1990).

[2] The exception to the general rule that a person born in the United States gains American citizenship occurs when a child is born to a foreign diplomat posted in the United States. The child will not gain citizenship because the parents are not subject to the jurisdiction of the United States as required by 8 U.S.C. § 1401. The parents are not subject to United States jurisdiction because of their diplomatic immunity under article 31 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.

[3] 8 U.S.C.A. § 1401g (West Supp. 1990).

[4] *See* C. Civ. arts. 21-24.

[5] Exceptions exist for children of stateless persons, *id.* art. 21-1(1); for children of unknown parentage, *id.* art. 21; for children born of parents whose nationality does not pass by birth under the nationality laws of their country of citizenship, *id.* art. 21-1(2); and for children born in France to non-French citizens, one of whom was born in France, *id.* art. 23. This last exception is particularly noteworthy because a person born to a United States service member and a United States citizen spouse in France would not acquire French citizenship, but that person's children born in France would.

[6] *Id.* art. 52.

[7] *Id.* art. 44.

[8] *Id.* art. 17.

the birth at a French embassy or consulate, is necessary. Acquisition of French citizenship also may occur even though the French parent has acquired United States citizenship by naturalization. Although the process of naturalization in the United States requires foreswearing allegiance to any other country,[9] under French law the French citizen must be eligible to renounce French citizenship and formally must declare his or her renunciation at a French embassy or consulate. Consequently, although many French brides have accompanied their American husbands to the United States and have become naturalized United States citizens, they never formally have renounced their French citizenship to the satisfaction of France.[10] These couples' children, therefore, regardless of their place of birth, are French citizens.

The misunderstandings surrounding French laws on citizenship have resulted in a dichotomy between perception and reality concerning dual nationality. Many people wrongly believe that they have French citizenship by virtue of their belief in the myth that birth in France automatically confers citizenship. On the other hand, many individuals who do not believe they have French citizenship, because at the time of their birth both their parents were American citizens, actually do have French citizenship. Unfortunately, these misunderstandings can lead to painful surprises.

Election of Nationality

"Oh, your child is a dual national, he has to elect which citizenship he wants to keep at age eighteen." This is another myth that does not have any basis in fact. If a child acquires dual citizenship by birth, no requirement exists to renounce one of the citizenships at any time.[11] As this article will address later, however, renouncing one of the citizenships at the appropriate time actually may be advisable.

Ramifications of Dual Nationality

Being a dual national has significant consequences. It provides many benefits but, it also imposes some liabilities. With dual nationality, a person is entitled to carry a passport for each country. In the case of a French-American dual national, possession of a French passport would ease access to all European Community countries and might provide some protection if the person encountered a terrorist incident. Further, being a French citizen allows access to certain jobs in France that require French nationality, such as admission to the French Bar. In addition, French citizenship qualifies an individual to receive social services and social security benefits, which are quite extensive in France.

The benefits of French citizenship to an American, however, may have substantial costs. If a person exercises the prerogatives of his French nationality too extensively, he may lose his United States citizenship. If a dual national voluntarily joins the armed forces of France, accepts a French military commission, or seeks an elective office or any other important political post in France, American authorities may consider the action highly indicative of the person's intent to renounce his or her United States citizenship.[12] The voluntary commission of expatriating acts such as these, accompanied by the intent to relinquish citizenship, almost certainly will result in the loss of United States citizenship.[13] Unfortunately, the risk of losing one's United States citizenship can be a very high price to pay for the benefits of being a dual national.

Further, although no French-American income tax treaty concerning double taxation exists,[14] a person holding dual nationality must consider the implications that his or her dual citizenship has on income and investment taxes. Even if no double taxation occurs, the complications involved in accounting taxable transactions to two sovereign governments can be substantial.

The Most Significant Ramification of Dual Nationality—Mandatory French Military Service

The most significant cost of dual nationality comes from France's mandatory national military service; and this is the cost that comes as the most surprising. Frequently a young man will come to France on vacation only to have French authorities arrest him at the border as a draft evader. Obviously, this comes as quite a shock to a young man who did not even know that he was a French citizen.

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[9] 8 U.S.C.A. § 1448(a)(2) (West Supp. 1990).

[10] C. Civ. art. 87. Prior to January 9, 1973, voluntary acceptance of another nationality because of marriage resulted in automatic loss of French citizenship; however, minor children did not lose their French citizenship. After January 9, 1973, French citizenship is maintained notwithstanding marital status unless specifically and formally renounced. J. O. 73-42 (1973).

[11] *See, e.g.*, 8 U.S.C.A. § 1481 (West Supp. 1990) (providing for loss of United States citizenship by voluntarily accepting citizenship in a foreign state). By implication, *involuntary* acquisition of foreign citizenship will result in dual nationality. *See also* C. Civ. art. 24 (allowing renunciation of French citizenship for dual national, but not requiring renunciation of other nationality as a prerequisite for maintaining French citizenship). In Perkins v. Elg, 307 U.S. 325 (1939), the Supreme Court recognized the existence of dual nationality.

[12] 8 U.S.C.A. § 1481(a) (West Supp. 1990).

[13] *Id.* The United States Department of State must prove an individual's intent to relinquish citizenship by a preponderance of the evidence. *See* Vance v. Terrazas, 444 U.S. 252 (1980).

[14] Convention between the United States and the French Republic with Respect to Taxes on Income and Property, July 11, 1968, Tax Treaties (CCH) 2803.

French law requires all male citizens of France to perform national military service at some time after the age of nineteen.[15] The individual normally must satisfy this requirement by serving for one year in a military unit.[16] Other options include serving for sixteen months as a civilian worker for a French overseas department[17] or as an employee of a French industry in a foreign country.[18] To qualify for one of these options a person must have special educational and technical qualifications. Regardless of which option the young man may elect, however, the pay during French mandatory service is extremely low. Generally, people in France regard French national military service as, at best, a civic duty that the male French citizen simply must endure.

Although the service is mandatory, all men are entitled to a deferment until they reach the age of twenty-two.[19] The French government always will grant a deferment, but the individual must request it. Furthermore, additional deferments to age twenty-five are permitted for educational reasons.[20]

Because of the requirements of military service, French border authorities maintain a list of young men who have not fulfilled their obligation and arrest them upon entering the country. If the individual does not have a deferment or exemption, border police will arrest him, and authorities will ship him off to basic training immediately.

A dual national can avoid French military service in four ways: (1) renunciation of citizenship; (2) exemption because of residence outside France; (3) exemption because of actual military service in the other country of nationality; and (4) exemption because of age.[21]

A dual national may renounce his French citizenship.[22] He must do so, however, during the six months preceding his achieving the age of majority—that is, his eighteenth birthday.[23] In addition, renunciation is effective only if one parent is a French citizen. If both parents are French citizens—a circumstance that may occur if the non-French parent gained French nationality during the minority of the young man—then he cannot renounce.[24] The man must make this renunciation at a French embassy or consulate. If he resides in France, he must declare the renunciation before the local court, the *Tribunal de Grande Instance*, where he resides.[25]

Interestingly, because individuals born in France to non-French citizens automatically gain French citizenship at age eighteen if they resided in France during the five years preceding their eighteenth birthday, and because a dual national's renunciation is effective only if declared during the six months prior to that person's eighteenth birthday, some dual nationals effectively must renounce their French citizenship before they actually have it. Fortunately, French law permits an individual to preempt his French citizenship in these cases.[26] If the individual fails to accomplish renunciation before the age of eighteen, he may renounce French citizenship at a later time. The process, however, is very time consuming and costly. Moreover, the government normally will not grant or recognize these renunciations until the young man performs his military service or receives an exemption from doing so.[27]

A dual national may be exempt from French national military service if he resides outside of France in the other country of nationality between the ages of eighteen and twenty-one.[28] To apply for this exemption, the young man must prove outside residence and must not have spent more than ninety days in any one year in France.[29] The young man also must have complied with the national service requirement of the other country of nationality.[30] In the case of a dual national having United States citizenship, the man merely would have to be registered with the Selective Service System to satisfy this requirement.

The majority of French-American dual nationals whom French authorities have arrested for draft evasion have been able to establish outside residence by producing

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[15] C. Serv. arts. L.5, L.47.

[16] *Id.* art. L.2.

[17] *Id.* arts. L.9, R.23.

[18] *Id.* arts. L.9, R.23, R.24.

[19] *Id.* arts. L.5, L.11, L.14.

[20] *Id.* art. L.10 (allowing deferments are for doctors, dentists, pharmacists, and veterinarians).

[21] Other exemptions to mandatory service exist that are not dependent on dual nationality. These include individuals whose parents or siblings "Died for France," *id.* art. L.31; individuals who provide the sole financial support for their family, *id.* art. L.32; and individuals employed in an essential profession for the collective good, *id.* art. L.36.

[22] C. Civ. arts. 19, 24.

[23] *Id.*

[24] *Id.* art. 24.

[25] *Id.* arts. 101, 104.

[26] *Id.* art. 45.

[27] *Id.* art. 89.

[28] C. Serv. art. L.38.

[29] *Id.* art. R.69.

[30] *Id.* art. L.38.

their Selective Service registration cards and documentary proof of their residency in the United States. This proof can consist of school transcripts, tax returns, statements from employers, and even affidavits from acquaintances. With adequate proof, French authorities grant the exemption readily.

Dual nationals who are eligible for this exemption should have their exemption approved before coming to France. To avoid all difficulties, a dual national, at age eighteen, should go to the nearest French embassy or consulate and request deferment of military service until age twenty-two. Subsequently, after his twenty-second birthday, he should go back to an embassy or consulate and provide proof of continuous residence in the United States and proof of Selective Service registration. Accordingly, French authorities will grant the exemption and will not issue an arrest order. Furthermore, the French authorities will provide the dual national with a document that verifies the exemption, which he should carry when traveling in France.

The third method for a dual national to avoid French national military service is to serve in the armed forces of his other nationality.[31] The young man must submit proof of this service to a French embassy or consulate. Again, to avoid having French authorities list him as a draft evader, the dual national should request a deferment at age eighteen and return with proof of service at age twenty-two.

The fourth method of avoiding French national military service is through longevity. If a dual national resides continuously outside of France until the age of twenty-nine, French authorities will consider him too old for mandatory service and will exempt him.[32] If, however, France calls an individual to serve, but he evades, he will not be exempt from induction until age thirty-four.[33]

If none of the exemptions apply, French authorities will induct the individual into the French military and he will serve for one year. Fortunately, this service will not endanger the United States citizenship of the individual because it does not constitute voluntary service.[34]

Conclusion

Although most of the myths about dual nationality are just that—myths—some of the ramifications are very serious. Accordingly, parents of children who may be dual nationals should consider the consequences carefully. If one of the parents is, or was, a French citizen, that parent should consult with the nearest French embassy or consulate to ensure that he or she knows the rules. As a potentially dual national son approaches the age of eighteen, his parents should ensure that he understands the option of deferment and the significance of qualifying for, and documenting his receipt of, an exemption to mandatory French national service. Even though he actually does not have to elect which citizenship ultimately to maintain, being informed and taking the right actions in a timely manner will avoid many potentially serious complications.

[31] *Id.* arts. L.38b, R.75.

[32] *Id.* art. L.7.

[33] *Id.*

[34] 8 U.S.C.A. § 1481 (West Supp. 1990).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Grievous Bodily Harm?: Give Me a (Real) Break!

Several cases recently received in the Defense Appellate Division indicate that many trial defense counsel too easily may be conceding one of the essential elements of assault in which grievous bodily harm intentionally is inflicted—that is, the element requiring proof that the injury actually amounts to grievous bodily harm. The point is important because the difference in maximum punishments between assault consummated by a battery and assault in which grievous bodily harm intentionally is inflicted is substantial. The former carries a maximum punishment of confinement for six months and a bad conduct discharge, while the latter carries a maximum punishment of confinement for five years and a dishonorable discharge. At least three of these recent cases involve virtually identical injuries—broken noses accompanied by black eyes. This note will explore the law applicable to grievous bodily harm, discuss the recent Army Court of Military Review decision in *United States v. Jones*,[1] and suggest approaches trial defense counsel might take when dealing with this issue.

[1] CM 8902640 (A.C.M.R. 28 Nov. 1990) (unpub.).

The existence of grievous bodily harm is a fact that must be proven beyond a reasonable doubt by the prosecution just like any other essential fact. Whether an injury constitutes grievous bodily harm "is ordinarily one of fact for the court to determine in light of the surrounding circumstances."[2] The Manual for Courts-Martial[3] provides some help in explaining the concept of grievous bodily harm by providing that "'[g]rievous bodily harm' means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries."[4] As the Army Board of Review in *United States v. Miles* pointed out almost forty years ago, "the patent difficulty with the Manual definition is that it leaves a vacuum between minor injuries on the one hand and grievous or serious injuries on the other hand, without a test or guide to determine either."[5]

The *Miles* decision was an early and particularly scholarly effort to provide a principled distinction between injuries that amounted to grievous bodily harm and those that do not. The Army Board of Review in that case surveyed military and civilian law on the question and came up with four guiding principles:

> 1st. An injury to constitute "grievous bodily harm" or "serious bodily injury," within the meaning of the Code and Manual provisions respectively, must be of a graver and more severe character than that resulting from a simple assault and battery.
>
> 2nd. Pain, superficial or trivial wounds, and temporary impairment of some organ of the body, such as a temporary dullness of the hearing, do not ordinarily, individually or collectively, establish "grievous bodily harm" or "serious bodily injury" in as much as such incidents are ordinarily experienced in most of the ordinary assault and battery cases that occur.
>
> 3rd. In consonance with the foregoing, the question whether an injury constitutes "grievous bodily harm" or "serious bodily injury" is ordinarily one of fact for the court to determine in light of the surrounding circumstances.
>
> 4th. In making the ultimate determination, the presence or absence and extent of factors such as persistence of the injury and its adverse effects, severity of pain or suffering, danger or reasonable apprehension of danger to life, health, or limb, hospitalization or confinement to bed or room, unconsciousness induced, unusual force or violence applied, interference with normal activities, and medical testimony may properly be taken into consideration.[6]

It is important to note that in arriving at the above principles, the *Miles* board said that factors such as the victim being a female and the comparative strength of the assailant and victim should not be given any consideration in determining whether an injury constituted "grievous bodily harm."[7]

Several early cases held that the injuries involved did not amount to grievous bodily injury. For instance, in *United States v. Cabuag*[8] the board held that deep lacerations of the right forehead and right eyebrow, both requiring stitches, and two huge black eyes and multiple lacerations and abrasions of the forehead did not amount to grievous bodily harm. Similarly, *United States v. Lara*[9] held that several bruises about the head and face, bandaged ankles and hands, and considerable pain in movement did not establish grievous bodily harm. Finally, in *United States v. Salazar*[10] the board found that a one-inch laceration of the chest that did not penetrate the chest cavity was not grievous bodily harm despite the victim's requiring stitches and spending two days in the hospital where he received shots.

Recently the Army Court of Military Review decided the *Jones* case. Jones was convicted of intentionally inflicting grievous bodily harm upon a female victim by striking her once in the face with his hand or fist. The nature of the resulting injuries were undisputed at trial: the bridge of her nose was fractured, a one-half centimeter laceration was apparent on the side of her nose, and a hematoma and reddening affected the right eye. The trial defense counsel had not disputed that these injuries amounted to grievous bodily harm. The court went

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[2]United States v. Miles, 10 C.M.R. 283 (A.B.R. 1953).

[3]Manual for Courts-Martial, United States, 1984, Part IV, para. 54c(4)(a)(iii) [hereinafter MCM, 1984].

[4]*Id.*

[5]*Miles*, 10 C.M.R. at 285.

[6]*Id.* at 293.

[7]*Id.* at 291-92.

[8]22 C.M.R. 734 (C.G.B.R. 1955).

[9]3 C.M.R. 277 (A.B.R. 1952).

[10]7 C.M.R. 389, 397 (A.B.R. 1952).

through a *Miles*-type analysis and noted "[t]he victim required no medical treatment or surgery. She suffered no loss of function or disfigurement. There was no danger to her life, health or limb. The pain was neither persistent or severe."[11] The court then exercised its responsibility under article 66(c) of the Uniform Code of Military Justice and said that "we are not satisfied that the victim's injuries amount to 'grievous bodily harm.'"[12]

Counsel can learn several lessons from *Jones*. First, defense counsel vigorously should challenge the nature of any injury when he or she can argue reasonably that the injury is not "grievous." Defense counsel must not be lulled into complacency by the prosecution's recitations of phrases from the Manual such as "fractured bone" or "deep cut." Instead, defense counsel should explore in detail the true nature of the injury and its impact on the victim. If a case involves not much more than a broken nose or some other common injury, counsel has precedent to support the proposition that grievous bodily harm does not exist.

Defense counsel should interview the victim, family members, roommates, workmates, and anyone else who might have knowledge of how the injury has affected the victim. Specific inquiry should be made into any daily routines or activities affected by the injury and any indicia of pain and its intensity and persistence.

A very important source for the defense counsel is the medical profession. In many cases, doctors will testify that an injury is minor while most laypersons initially might believe it to be serious. If a doctor can provide favorable defense testimony, the doctor should be brought into court—it makes no sense for the defense to stipulate away the impact that this type of expert witness can have on a court-martial. In *Jones* appellate defense counsel discussed the injuries with a doctor who was helpful in developing a persuasive explanation of why the injuries should not be considered "grievous" or "serious."

Finally, trial defense counsel should make sure that the appellate record of the case contains material an appellate court can use to determine whether the injuries actually were grievous. Examples from the *Jones* record included uncontroverted testimony concerning the nature of the injuries, photographs of the victim after the assault, and stipulated testimony of a medical doctor. Additional items that may be helpful are medical records. Captain Michael J. Berrigan.

A Drug by Any Other Name

The Court of Military Appeals recently reaffirmed the basic principle that the identity of a controlled substance ingested is not relevant in determining the wrongfulness of its use. In *United States v. Myles*[13] the court held that exclusion of a defense surrebuttal witness whose proposed testimony was based on a flawed legal theory was not prejudicial to the accused. The theory was flawed because the accused's lack of knowledge of the specific contraband substance he used was not an innocent lack of knowledge.[14]

In *Myles* an anonymous source phoned the accused's orderly room to report "that Senior Airman Myles was using drugs."[15] The accused waived his rights and submitted to a urinalysis that tested positive for cocaine. Contrary to his plea, the accused subsequently was convicted of one specification of cocaine use. At trial, the government called as its only witness, on the merits and in rebuttal, Naresh Jain, Ph.D., a forensic toxicologist who explained the significance of the urinalysis results. Through cross-examination, defense counsel tried to establish that the testing of the accused's urine specimen also had established the presence of marijuana, bolstering the defense's theory that the accused had smoked marijuana cigarettes that he did not know were laced with cocaine. In addition, the accused actually took the stand and testified that he never knowingly used cocaine. He further testified, however, that he had smoked marijuana on four consecutive nights before taking the urinalysis test, and he would not have been surprised if he had tested positive for marijuana.[16]

When trial counsel cross-examined the accused about whether he "notice[d] anything unusual or different," such as numbness in his mouth, when he smoked the marijuana cigarettes on the four evenings before the test, the accused said the effects were "just about the same" as on all the other occasions when he had smoked marijuana.[17] Doctor Jain testified in rebuttal, however, that had the accused smoked marijuana to the extent claimed, his urinalysis would have revealed a higher concentration of marijuana, and if cocaine had been put on the marijuana, the accused would have experienced immediate numbness of the tongue. The accused's version of the facts, according to Doctor Jain, was therefore inconsistent with the scientific evidence.[18] The defense then intended to call as a surrebuttal witness Mr. Tommy Anderson, the

[11] *Jones*, slip op. at 2.

[12] *Id.*

[13] 31 M.J. 7 (C.M.A. 1990).

[14] *Id.* at 8.

[15] *Id.* at 7.

[16] *Id.* at 8.

[17] *Id.*

[18] *Id.*

social actions officer at accused's base, whose proffered testimony was that marijuana laced with cocaine was a common practice, and that individuals might not notice a discernible difference between plain marijuana and marijuana laced with cocaine.

The Air Force Court of Military Review held "that the military judge erred in excluding the proffered testimony on the basis of relevancy," finding that the drug counselor's testimony would have tended to support the accused's theory of innocent ingestion, as well as rebut the theory that drug abusers experience a noticeable difference between ingesting marijuana and marijuana that has been laced with cocaine.[19] The Air Force court concluded, however, that the error was not prejudicial, focusing on the fact that the defense witness's testimony would have countered a portion of Doctor Jain's testimony but would not have countered the fact that was most damaging to the accused—Doctor Jain's testimony that smoking a cocaine-laced marijuana cigarette, or cigarettes, was highly implausible given the positive urinalysis for the cocaine metabolite with a concomitant negative screening for the marijuana metabolite.[20] Additionally, Doctor Jain had testified that the smoking of a cocaine-laced marijuana cigarette would have required the constant application of a lighter or other means of combustion.[21] Ultimately, the Air Force court was "persuaded that the members would have found the appellant guilty even if the defense witness had been allowed to testify as indicated in the offer of proof."[22]

The Court of Military Appeals reached the same basic conclusion in the case, but went further by stating that a fatal flaw existed in the defense theory that the accused was not guilty of cocaine use because he believed that he was smoking marijuana. Citing *United States v. Mance*,[23] the court stated that for possession or use to be "wrongful," it is not necessary that the accused was aware of the precise identity of the controlled substance, as long as he was aware that he actually was using a controlled substance.[24] Moreover, the court noted that the variation between the maximum punishments for wrongful use of cocaine and for wrongful use of marijuana does not alter the basic principle that the identity of the controlled substance ingested is not important in determining the wrongfulness of its use.[25]

Trial defense counsel should note this case and advise their clients accordingly. The wrongfulness element of use and possession drug offenses lies not in knowing the specific name and nature of the drug, but in knowing that it is a controlled substance. A defense counsel who seeks to present a defense theory similar to the one in *Myles* should consider, however, putting the expert on as a witness in the defense case-in-chief, rather than as a surrebuttal witness. If offered as a defense expert, counsel would perhaps be able to gain admission of testimony, like that proffered in *Myles*, that an individual may not notice a discernible difference between marijuana in which cocaine has been placed and plain marijuana. When offered as surrebuttal, counsel risk exclusion of the testimony based on the result in *Myles* or based on the rationale from *United States v. Hawley* that "the mere fact that a witness takes the stand to testify does not automatically trigger the right to offer evidence to bolster his credibility."[26] In *Myles*, however, the accused's credibility probably was not attacked sufficiently, under the factors discussed in *Hawley*,[27] to justify calling the defense witness in surrebuttal. Captain Holly K. Desmarais.

Does Rape Require Resistance?

The third element of rape is "that the act of sexual intercourse was done by force and without [the woman's] consent."[28] Unlike the other elements of the offense, the legal standard for this element is not clear. What combination of the woman's state of mind and the man's actions will constitute the requisite force and lack of consent?[29] Some precedent indicates that a particular level of

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[19] United States v. Myles, 29 M.J. 589, 592 (A.F.C.M.R. 1989).

[20] *Id.* at 592.

[21] *Id.*

[22] *Id.* at 592-93. The dissent argued that there was "*no way to measure how much credibility the Government expert would have retained had the defense's Social Actions expert countered him and proved him fallible.*" *Myles*, 29 M.J. at 593 (emphasis in original).

[23] 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988).

[24] *Myles*, 31 M.J. at 9.

[25] *Id.* The maximum punishment for wrongful use of marijuana is two years' confinement, rather than the five years' confinement as authorized for wrongful use of other controlled substances. *See* MCM, 1984, Part IV, para. 37e.

[26] United States v. Hawley, 30 M.J. 1247, 1249 (A.C.M.R. 1990).

[27] *Id.* at 1250.

[28] Uniform Code of Military Justice art. 120, 10 U.S.C. § 920 (1982) [hereinafter UCMJ]; MCM, 1984, Part IV, para. 45b(1)(c).

[29] The Manual for Courts-Martial's explanation for this third element provides in part:

> [I]f the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If the woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice.

MCM, 1984, Part IV, para. 45c(1)(b).

resistance by the woman is a legal component of this element—not just a relevant factual consideration.[30] Dicta in two recent decisions of the Court of Military Appeals addressed the matter. The cases split the element in two. One case expressed the position that, with respect to lack of consent, the woman's resistance is no part of the legal definition. The second case stopped short of saying the same with respect to force, suggesting that resistance is part of the legal framework of that particular aspect of rape.

A look at an old Supreme Court case is helpful in seeing how the court's dicta represents a shift in analysis. The case, *Mills v. United States*,[31] reflects the view that, absent certain circumstances, a victim's resistance comprises part of the legal definition of "force and lack of consent"—that is, the woman's lack of consent means not only her subjective view of the situation, but also her objective response to it. In 1896, a federal court in Arkansas sentenced Mills to hang for the crime of rape. According to the victim, Mills rode up to her home one winter night calling out that he was lost. When her husband opened the door, Mills forced the night-shirt-clad husband out of the house at gunpoint, entered the home, and forced the wife to "have connection with him" twice. Mills's claim, however, was that he was elsewhere at the time.[32]

On appeal to the Supreme Court, Mills challenged the adequacy of this instruction to the jury:

> The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of the crime.[33]

The Court granted a new trial because the instruction failed to explain fully the nonconsent and force necessary to make an act of sexual intercourse a rape. The Court opined that, while some circumstances justified merging the force element with the element of sexual intercourse, the subjective nonconsent of the victim—standing alone—was not such a circumstance. Thus, by suggesting as much, the instruction swept too broadly:

> It covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply non-consent on her part and no real resistance whatever. Such non-consent as that is no more than a mere lack of acquiescence, and is not enough to constitute the crime of rape.... More force is necessary when that is the character of non-consent than was stated by the court to be necessary to make out that element of the crime. That kind of non-consent is not enough, nor is the force spoken of then sufficient, which is only incidental to the act itself.[34]

Two recent cases from the Court of Military Appeals reflect a modern trend against the traditional view of resistance as a legal component of rape.[35] The first case is *United States v. Watson*.[36] One afternoon in 1987, Captain Watson invited Liza, who was cleaning his barracks room, to take a nap with him. She refused. According to Liza, Captain Watson then pushed her onto the bed and laid on top of her. She kicked and told him to let her go, but he held her arms above her head with one hand and fondled her breasts and crotch area with the other. Somehow, he managed to get his penis out and into her vagina. According to Captain Watson, Liza registered no objection until intercourse had begun and, crying, she complained that it hurt.

Instead of rape, the military judge found Captain Watson guilty of indecent assault by fondling Liza and engaging in sexual intercourse with her. On appeal, Captain Watson argued his conviction was inconsistent with his acquittal for rape. The only issue at trial was whether or not Liza had consented to the intercourse. Therefore, Captain Watson argued, an acquittal on that issue with respect to the rape mandated an acquittal on that issue with respect to the assault. In other words, the failure to prove lack of consent for purposes of the rape established the victim's consent for purposes of assault.[37]

Writing for the court, Judge Cox agreed that the consent aspects of rape and assault are the same—purely questions of what the victim subjectively willed. Thus, Judge Cox accepted Captain Watson's legal premise. Nevertheless, because the record clearly established the trial judge's finding of nonconsent by the victim and that Captain Watson was not reasonably mistaken as to her nonconsent, the premise afforded Captain Watson no relief. The problem, Judge Cox found, was the trial judge's misapprehension about the nature of rape. The

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[30] *See, e.g.*, United States v. Moore, 15 M.J. 354, 372-75 (Everett, J., dissenting) (discussing acquiescence as a defense to rape); United States v. Tomlinson, 20 M.J. 897, 902 (A.C.M.R. 1985) ("Under th[e] legal definition [of rape], a female can honestly believe she has been raped, when, as a matter of law, she has not. For example, if the female does not consent to sexual intercourse but fails to make her lack of consent reasonably manifest, no rape has occurred.").

[31] 164 U.S. 644 (1897).

[32] *Id.* at 645-46.

[33] *Id.*

[34] *Id.* at 645-48.

[35] For evidence of the trend, see Estrich, *Rape*, 96 Yale L.J. 1087 (1986).

[36] 31 M.J. 49 (C.M.A. 1990).

[37] *Id.* at 50-51.

trial judge mistakenly thought that, in addition to a subjective withholding of consent, the "rape" victim had to manifest it objectively to an extent that was reasonable under the circumstances. Because the judge's reasonable doubt extended only to this non-element of rape, his acquittal of Captain Watson on that offense was merely a windfall that did not undermine the legitimate basis for a finding of indecent assault. The court stated:

> It is bewildering ... how the military judge could seemingly have found such an independent, affirmative duty on the part of a rape victim. The explanation given in the Manual—mere commentary at that—in no way suggests such an independent duty. Obviously, where there is no manifestation of lack of consent, an inference *may* be drawn that the victim consented, or a reasonable inference *may* be raised that the accused was reasonably and honestly mistaken as to consent. But if there is no reasonable doubt of lack of consent and no reasonable doubt as to whether the accused was reasonably and honestly mistaken thereto, then the lack-of-consent aspect of rape has been satisfied *just as it has with all the lesser-included offenses.*[38]

The second case from the Court of Military Appeals is *United States v. Bonano-Torres*[39]—a case the government certified for review from the Army Court of Military Review. Staff Sergeant Bonano-Torres, a finance noncommissioned officer, was on temporary duty with a female military finance clerk. After work, the two went out for dinner and drinks. Returning to their hotel, the sergeant entered the woman's room and asked to use the bathroom. She assented, lay on the bed, and fell asleep. She awoke to find the naked sergeant kissing her and fondling her breasts. She turned her head, moved his hands, and told him to stop, which he did. A second time she fell asleep, but again awoke to find him removing her pants. She warned him about his marriage and children and, when he persisted, told him to stop, which he again did. A third time, she went to sleep. Awakening again, she discovered he had positioned himself between her legs. Because she wanted to sleep and knew he would not stop harassing her otherwise, she did not resist the third attempt.[40]

The Army Court of Military Review reversed the rape conviction, holding that the woman's lack of resistance demonstrated an acquiescence that, as a matter of law, negated a necessary element of rape.

> If the alleged victim does not resist but instead acquiesces—submits passively—to the act, it cannot be said that force has been applied. In other words, "without consent" means "against the will" of the victim. Thus, evidence of lack of consent alone without evidence of resistance as may be appropriate under the circumstances establishes, at law, no more than the victim's acquiescence and as such does not constitute the crime of rape.[41]

No constructive force theory applied because no justifiable excuse for failing to resist, such as no incapacity, threats of bodily harm, or apparent futility, arose under the facts of the case.[42]

Citing *Mills*, the Court of Military Appeals affirmed the Army court's decision, rejecting the government's argument that the lower court had based its opinion on an erroneous assumption that resistance was an element of rape. The Court of Military Appeals found the lower court's decision supportable in two respects. First, aside from the victim's lack of resistance—that is, her failure objectively to manifest her lack of consent—Judge Sullivan concluded that the lower court factually had found the victim's subjective consent to intercourse. That factual determination, which was supported by the evidence, made the court's rendering an opinion on the legal status of resistance as an element of rape unnecessary.[43] Nevertheless, the court intimated its view on the issue by rejecting the government's contention that the lower court had held resistance to be an element of rape. As a second basis for upholding the Army court's decision, Judge Sullivan concluded that, far from finding that resistance is an element of rape, the lower court merely had held that resistance, among other factors, is relevant in determining whether the accused had accomplished sexual intercourse through force.[44]

Considering the dicta of the Court of Military Appeals when analyzing facts that have produced a rape charge,

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[38] *Id.* at 52-53 (emphasis in original).

[39] 31 M.J. 175 (C.M.A. 1990).

[40] United States v. Bonano-Torres, 29 M.J. 845, 847-48 (A.C.M.R. 1989).

[41] *Id.* at 850 (citations omitted).

[42] *Id.* at 850-51.

[43] *Bonano-Torres*, 31 M.J. at 177-78. The Court of Military Appeals focused on this language from the lower court regarding whether it could affirm any lesser included assault:

> While we know a rape was not committed in this case, we are also not satisfied beyond a reasonable doubt that the [accused]'s initial acts were committed without the consent of the victim.

Id.

[44] *Id.* at 178-79.

defense counsel should choose the best defense within the following legal framework. First, unless counsel can establish the victim is lying, her testimony that she did not consent is going to establish the lack-of-consent aspect of rape. The next line of defense is the accused's honest and reasonable mistake as to the woman's lack of consent.[45] Under both of these lines of defense, however, the woman's failure to resist, rather than establishing a legal deficiency of proof, will be merely factual grist for an argument about the woman's deception on the stand or the accused's mistaken belief at the time of intercourse.

Oddly, under this dicta, the constructive force aspect of rape may be the last stronghold for an argument that the woman did not resist enough legally to make the sexual intercourse a rape. Constructive force theories apply when, under certain circumstances, the law will excuse the victim's lack of resistance. Thus, the existence of these theories presupposes that the victim's resistance is an element of rape—at least in anything other than the defined circumstances. Generally, two circumstances justify lack of resistance: (1) when the victim is incapable of resisting; and (2) when resistance would be futile.[46]

Exactly when these circumstances obtain is becoming less and less clear. The Manual suggests that incapacity means something more than merely a psychological reluctance to resist caused by fear or other emotional factors. Indeed, the Manual indicates that incapacity is tied to the victim's ability to comprehend what is happening:

> [I]f to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act [of intercourse] is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.[47]

Similarly, the Manual suggests a fairly extreme standard for futility: "All the surrounding circumstances are to be consider[ed] in determining whether a woman ... failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm."[48] Courts, however, typically have resisted the application of these as legal standards.[49]

Nevertheless, defense counsel need not yet abandon arguments resting on the legal requirement that the woman resisted the unwanted sexual advance of a client. Rape denotes a violence not inherent in the sexual act.[50] Absent some demonstration of violence by the man, the force element of rape legally should require an effort by the woman to resist. Otherwise, the crime of rape will have broken completely from its original meaning to encompass any sex that a man negligently fails to perceive as unwanted. When Congress assigned death as a permissible punishment for the crime, it certainly had something else in mind. Captain Brian D. Bailey.

Can't Change Your Mind Now, or Can You?

Trial by members is a right enjoyed by soldiers.[51] Recently, the case of *United States v. Frye*[52] tested how important this right is. In *Frye* during the initial article 39(a)[53] session prior to arraignment, the defense counsel submitted a written request for a trial by a panel comprised of one-third enlisted members. The military judge then informed the accused of his right to request trial by judge alone, but did not inform him of his right to request trial by a court composed of officer members. The accused told the military judge that he did not want a trial by judge alone. The request for enlisted members was granted by the military judge.

After the motions were argued, the defense counsel informed the military judge that the accused wished to withdraw his request for an enlisted panel, and be tried by a panel comprised solely of officers. The defense counsel specifically argued that due to the excusal of three enlisted members, the defense wished to change its forum selection. The military judge denied the request.

Thereafter, at the same article 39(a) session, the accused requested to be tried by military judge alone, because his request for an all officer panel had been denied. The military judge discussed the forum options available. The defense counsel accurately pointed out on the record that the right to be tried by an all officer panel had been denied, and therefore was not available. The military judge stated that he was not going to delay the court-martial to assemble an officer panel. Accordingly, the accused subsequently was tried by military judge alone. Consequently, the military judge essentially compelled the accused to be tried by a forum not of his choice.

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[45] *See* United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Baran, 22 M.J. 265 (C.M.A. 1986); United States v. Carr, 18 M.J. 297 (C.M.A. 1984).

[46] *Bonano-Torres*, 31 M.J. at 179-80. Threats of bodily harm—to one degree or another—often appear as a third circumstance. Unclear, however, is whether such threats are not just another aspect of futility. *Id.* ("accused did not use threats of bodily harm and ... circumstances were not otherwise such that resistance would be futile").

[47] MCM, 1984, Part IV, para. 45c(1)(b).

[48] *Id.*

[49] *E.g.*, *Watson*, 31 M.J. at 52 (characterizing the Manual for Courts-Martial's explanation as "mere commentary").

[50] The etymology of the word rape has more to do with violence than with sex. *See* Webster's Ninth New Collegiate Dictionary 975 (1984).

[51] *See* UCMJ art. 16; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 903 [hereinafter R.C.M.]; United States v. Sherrod, 26 M. J. 30 (C.M.A. 1988).

[52] CM 8901030 (A.C.M.R. 23 Aug. 1990) (unpub.).

[53] UCMJ art. 39(a).

Based on these facts, the Army Court of Military Review held that the military judge committed prejudicial error. The court cited *United States v. Stipe*[54] and Rule for Courts-Martial 903(d)(1)[55] in support of its decision to set aside the findings of guilty and the sentence and to authorize a rehearing.

While a scenario like the one in *Frye* does not occur often, it is important for defense counsel to remember that the accused is entitled to decide what forum will try him, and that the accused's election can be withdrawn at any time before the end of the initial article 39(a) session.[56] Defense counsel should note this case when faced with a military judge who denies the accused his right to make a timely withdrawal and modification of his forum selection. Captain Pamela J. Dominisse.

Article 134—Worthless Checks and Bad Debts: Dishonorable Conduct or Simple Negligence?

Recent decisions by the Army Court of Military Review have set aside guilty findings for article 134[57] bad-check and failure-to-pay-debt offenses.[58] The common defect in these cases has been an inadequate showing of dishonorable conduct by the accused.

If larceny[59] and forgery[60] are not at issue, a common scenario is the case in which the accused has written numerous bad checks that he or she cannot later redeem. The government charges the bad checks under UCMJ article 123a and the accused pleads guilty to the lesser-included bad-check offense under UCMJ article 134. Another common scenario is the case in which the accused defaults on installment loans. The accused is charged with, and pleads guilty to, a charge of dishonorable failure to pay debts under UCMJ article 134. During the providence inquiry in either case, the military judge defines the term "dishonorable" and asks the accused if that definition describes the accused's conduct. After a "yes" answer, the judge asks a few follow-up questions and moves on. A frequent problem on appeal is that the judge did not elicit enough facts from the accused to meet the legal standard of dishonorable conduct.

In *United States v. Duval*[61] the accused pleaded guilty to: (1) uttering bad checks with intent to defraud under UCMJ article 123a, and (2) to a dishonorable failure to pay just debts under UCMJ article 134. On appeal, the UCMJ article 134 findings of failures to pay debts were set aside because the judge elicited only acknowledgments from the accused that his checks were bad and that his conduct was dishonorable. The Army court ruled that merely securing an accused's acknowledgment of guilt in terms of legal conclusions does not establish a provident plea. Instead, the military judge must ask questions that elicit enough facts from which the military judge can conclude the legal standard has been met.[62]

The accused in *Duval* made an unsworn statement on sentencing that the creditors had sent written notice of his

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[54] 48 C.M.R. 267 (C.M.A. 1974). In the *Stipe* case, the accused was denied his right to withdraw his request for an enlisted panel and, therefore, forced to be tried by a forum not of his choice. The Court of Military Appeals held: "An accused cannot be compelled to be tried by a military judge alone; likewise, an accused cannot be compelled to be tried by a panel with enlisted members. In each instance the choice is his." *Id.* at 269 (quoting United States v. White, 45 C.M.R. 357, 362 (C.M.A. 1972)).

[55] R.C.M. 903(d)(1) states: "A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly."

[56] R.C.M. 903(e) allows untimely withdrawals before the introduction of evidence on the merits at the discretion of the military judge.

[57] UCMJ art. 134.

[58] MCM, 1984, Part IV, para. 68b, sets out the elements of the offense of dishonorable failure to maintain sufficient funds as follows:

> (1) That the accused made and uttered a certain check;
>
> (2) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;
>
> (3) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for the payment of the check in full upon its presentment;
>
> (4) *That this failure was dishonorable*; and
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(emphasis added).

MCM, 1984, Part IV, para. 71b, sets out the elements of the offense of dishonorably failing to pay a debt as follows:

> (1) That the accused was indebted to a certain person or entity in a certain sum;
>
> (2) That this debt became due and payable on or about a certain date;
>
> (3) *That while the debt was still due and payable the accused dishonorably failed to pay this debt*; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(emphasis added).

[59] UCMJ art. 121.

[60] *Id.* art. 123.

[61] 31 M.J. 650 (A.C.M.R. 1990).

[62] *Id.* at 651.

debt, but that he could not pay at the time. He stated, however, that he eventually paid the debt. The Army court ruled that the mere failure to pay a debt does not make the nonpayment dishonorable.[63] To be dishonorable, the nonpayment "must be characterized by deceit, evasion, false promises or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations."[64]

The same standard applies for UCMJ article 134 bad-check offenses. The "dishonorable failure" in a bad-check offense is the accused's failure to maintain sufficient funds in, or credit with, the drawee bank for payment of the check in full upon its presentment for payment.[65] Regardless of which offense is charged—bad checks or failure to pay debts—the recent cases apply any or all of the factors of deceit, false promise, bad faith, deliberate nonpayment, gross indifference, or gross negligence in determining whether conduct is dishonorable. In *United States v. Elizondo*[66] the Army court held that even if the accused knowingly gambled on his military pay reaching the bank before his checks, that only shows some degree of negligence and not necessarily gross negligence. In *United States v. Hensley*[67] the court held that, to sustain a finding of guilty under the theory of "gross indifference," the record must reflect either that the accused wrote the checks with knowledge that he did not and would not have the funds to honor the checks, or that his subsequent conduct demonstrated a flagrantly apathetic attitude toward payment of the checks.

In contested cases, the prosecution often tries to prove a "deliberate" nonpayment by the accused's simple failure to pay. The Court of Military Appeals in *United States v. Cummins*[68] said, "The fact that no payment has been made for a long time, even for an unconscionable period of time, does not itself establish that a failure to pay is dishonorable."[69] Similarly, in *United States v. Savinovich*[70] a conviction for failure to pay a debt was affirmed, but the Army court said the "[s]imple inability to pay a debt, contracted without a wrongful intention, is a defense" to a charge of dishonorable failure to pay.[71] A recent Navy-Marine Corps Court of Military Review unpublished opinion also provides a very interesting analysis regarding failure to pay debts. In *United States v. Wiggs*[72] the accused admitted that he intentionally did not pay a debt for some nine months. The court found no dishonorable conduct and said:

> There are ... at least two levels of intentional nonpayment of debt. There is the good faith deliberate nonpayment; settling debts according to perceived importance and availability of scarce funds. Second, the bad faith nonpayment accompanied by deceit, lies, etc., that falls well beyond the former state of mind. The latter is criminal.[73]

In two other recent cases, the Army court set aside some or all of the findings in guilty-plea cases involving bad checks under UCMJ article 134.[74] The court in each case found the accused's pleas improvident because the accused thought he had sufficient funds in the account when he wrote the checks. A similar decision was issued regarding some of the many specifications in a contested case charging bad checks under UCMJ article 123a.[75] Furthermore, at least two other cases are pending at the Army court that allege an improvident plea to UCMJ article 134 bad-check offenses.

The Navy-Marine Corps court has followed the same trend. In *United States v. Silas*[76] the court found the accused improvident in six of fifty-four specifications of dishonorably failing to maintain sufficient funds and said that the record showed "nothing more than simple negligence or simple indifference, as distinguished from the gross negligence or gross indifference that the law appears to require in order to demonstrate dishonorable conduct."[77] The court addressed the character of the

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[63] *Id.* (citing United States v. Cummins, 26 C.M.R. 449 (C.M.A. 1958)).

[64] *Id.* (citing MCM, 1984, para. 71c; United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955)).

[65] *See supra* note 58.

[66] 29 M.J. 798 (A.C.M.R. 1989).

[67] 26 M.J. 841 (A.C.M.R. 1988).

[68] 26 C.M.R. 449 (C.M.A. 1958).

[69] *Id.* at 454.

[70] 25 M.J. 905 (A.C.M.R. 1988).

[71] *Id.* at 908 (citing United States v. Stevenson, 30 C.M.R. 769, 775 (A.F.B.R. 1960)).

[72] CM 90-2206 (N.M.C.M.R. 20 Nov. 1990) (unpub.).

[73] *Id.*, slip op. at 1.

[74] United States v. Middleton, CM 9001811 (A.C.M.R. 17 Dec. 1990) (unpub.); United States v. Alexander, CM 9001708 (A.C.M.R. 31 Dec. 1990) (unpub.).

[75] United States v. Carter, CM 8902658 (A.C.M.R. 21 Dec. 1990).

[76] 31 M.J. 829 (N.M.C.M.R. 1990).

[77] *Id.* at 830.

accused's failure to place or maintain sufficient funds during the critical interval between uttering and presentment of a check, and stated that dishonorable conduct and a purpose of evasion logically may be inferred when, for example, a series of drafts that are known to be in excess of the drawee account's capacity to pay are written within a short period of time.[78]

The trend seems clear regarding "dishonorable conduct" in UCMJ article 134 offenses for failure to pay debts and for uttering bad checks. Simple acknowledgments by an accused will not suffice in a providence inquiry and if the accused has any excuse at all, the judge must resolve the issue on the record. In a contested case, the prosecution will be required to make a strong showing of dishonorable conduct. Many nondishonorable situations can arise. For instance, the client may have exhibited financial immaturity; had pay problems and was careless in his efforts to resolve them or make an inquiry; been negligent in record keeping; had some reasonable expectation regarding his pay; or intended to pay sometime in the future.

Accordingly, the next time a trial counsel says that he or she will do your client a big favor by taking a plea to a lesser-included UCMJ article 134 offense involving bad checks or failure to pay a debt,[79] defense counsel in the field might do well to recognize the difficult burden of proof resting on the trial counsel's shoulders—especially if the accused has any "honorable" facts in his or her favor. Additionally, in a bad-check case in which the accused did not confess, defense counsel should recognize that the government has a substantial burden of proof and that, to overcome it, the trial counsel may be required to produce witnesses such as the cashier, the custodian of the returned checks or some other qualified person, a documents examiner, and a handwriting expert. The government also will have to produce the check that bounced and some proof that the accused was notified of the dishonored check.[80]

In some circumstances, confronting the trial counsel with these realities may cause the government to forego a court-martial and may resolve the matter favorably for your client. In other cases, however, your professional judgment will tell you to keep quiet and not disclose to the trial counsel the weaknesses of the government's case. A thoughtful and spirited defense on the merits may result in an acquittal—or at least a favorable sentence—while ensuring that the trial counsel is not alerted to what the government must do to perfect its case. In either scenario, by recognizing the difficulties in proving the dishonorable nature of the accused's alleged conduct, defense counsel not only will be better prepared to respond to the trial counsel's generous offer, but also will be doing the client a big favor. Captain Jim Heaton.

Sentence Credit for Civilian Confinement

In *United States v. Dave*[81] the Army Court of Military Review extended pretrial confinement credit to include time spent in the pretrial custody of local civilian authorities when the accused later is sentenced to confinement solely by a court-martial. Essentially, the court established a bright-line rule extending the coverage of *Allen*[82] credit to include sentence credit for pretrial confinement regardless of who originally initiated confinement.[83] In *Dave* the accused confessed to Bell County Texas officials that he had sexual relations with a thirteen-year-old girl from his neighborhood. Bell County police placed the accused in confinement pending a decision by the Army on whether to exercise jurisdiction and prefer court-martial charges. The accused spent twenty-four days in civilian custody before military authorities sought his release.

The Army court cited its earlier decisions in *United States v. Huelskamp*[84] and *United States v. Davis*[85] as precedent for its holding that the accused should receive twenty-four days' sentence credit. Defense counsel in the field should use *Dave* to argue for full sentence credit—even for civilian pretrial confinement—when a court-martial is the only judicial action taken on the charges causing the confinement. Captain Jay S. Eiche.

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[78] *Id.*

[79] Defense counsel should note that the maximum punishment for a dishonorable failure to pay under UCMJ article 134 and for checks in the amount of $100 or less, regardless of whether the offense charged is UCMJ article 123a or 134, is the same: a bad-conduct discharge, forfeiture of all pay and allowances, confinement for six months, reduction to Private E1, and a fine. If the amount of the check exceeds $100 and the offense is charged as a procurement with intent to defraud under UCMJ article 123a, the maximum punishment includes a dishonorable discharge and confinement for five years. MCM, 1984, Part IV, paras. 49e, 68e, 71e.

[80] For a thorough analysis of how to try a bad-check case, see Richmond, *Bad Check Cases: A Primer for Trial and Defense Counsel*, The Army Lawyer, Jan. 1990, at 3.

[81] CM 9000975 (A.C.M.R. 4 Dec. 1990).

[82] United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

[83] The rule assumes that all charges are referred to court-martial and not prosecuted by another sovereign with concurrent jurisdiction. *See Dave*, slip op. at 3; United States v. Aldridge, 22 M.J. 870 (A.C.M.R. 1986).

[84] 21 M.J. 509 (A.C.M.R. 1985). A soldier is entitled to *Allen* credit "for time spent in pretrial confinement in a civilian jail under the direction of military authorities." *Dave*, slip op. at 3.

[85] 22 M.J. 557 (A.C.M.R. 1986) (granting sentence credit for pretrial confinement when accused is held at the insistence of federal officials). The *Davis* court rejected the government's argument that *Allen* credit should be granted only when pretrial confinement in a civilian jail is solely to facilitate the needs of *military* authorities.

Urinalysis Problems at the Installation Level

Last fall, the Court of Military Appeals decided two cases that addressed urinalysis problems at the installation level. Trial defense counsel should be familiar with these cases because they provided favorable results for each accused.

In *United States v. Strozier*[86] the Court of Military Appeals held that gross deviation from a service regulation's requirements concerning the collection and testing of urine samples could require exclusion of positive test results. Airman First Class Strozier was charged with a single specification of wrongful use of cocaine. At trial, his defense counsel moved to suppress the results of his urinalysis. Defense counsel's motion was based, in part, on the government's failure to follow applicable Air Force regulations in the collection, retention, and testing of the urine sample. Reversing the Air Force Court of Military Review, the Court of Military Appeals upheld the military judge's ruling in favor of the motion.

The violations of the Air Force regulation included: (1) collecting the sample with a plastic lid rather than with a urine-specimen bottle; (2) failing to seal the container with tamper-resistant tape; (3) failing to have the service member observe the sealing procedure; (4) failing to have the service member and the collector initial the container; (5) labelling the sample incorrectly; and (6) using the wrong forms to document the chain-of-custody. In addition, although the applicable regulation required sixty milliliters for testing, the lab tested the sample after thirty milliliters had spilled from the container during delivery.

Previously, the Court of Military Appeals had held that deviating from a regulation that sets out procedures for collecting, transmitting, or testing urine samples does not render a urine sample inadmissible as a matter of law.[87] The court now clearly has ruled that, although technical or minor deviations from the procedures mandated by urinalysis testing regulations do not *per se* render a sample inadmissible, serious deviations from the stated procedures may.

On the same day that it decided *Strozier*, the Court of Military Appeals decided *United States v. Konieczka*.[88] Staff Sergeant Konieczka was charged with one specification of wrongful use of marijuana. He had participated in a unit urinalysis and during a local prescreening test his urine sample had field-tested at 93.5 nanograms of marijuana metabolite per milliliter. The installation alcohol and drug control officer (ADCO) testified that even though the Army regulation sets the minimum screening level for a positive urinalysis for marijuana at 100 nanograms per milliliter, he forwarded the sample for further testing because he was "very confident" the tests at the lab would confirm the sample as positive. As the ADCO had predicted, the lab test confirmed the sample as positive for marijuana metabolite.

The military judge suppressed evidence of the final testing results at trial, noting that the purpose of the regulation is quality control and that it mandates that prescreened negative samples be selected randomly for quality control testing. He also noted that Military Rule of Evidence 313(b) states that if the purpose of an examination is to locate weapons or contraband and specific individuals are selected for examination, the government must prove by clear and convincing evidence that the examination was an inspection. The military judge then ruled that this was not an inspection, but a search for which no probable cause existed.

After the Army Court of Military Review reversed the military judge's ruling, the Court of Military Appeals reinstated it. The Court of Military Appeals held that, on the basis of the entire regulation, forwarding the sample for further testing was inappropriate. The court noted that an alcohol and drug control officer cannot forward a negative urine sample for further testing merely because he suspects it will test positive under different or more precise testing procedures.

When faced with a client under drug use charges based solely on urinalysis test results, trial defense counsel carefully should scrutinize the specimen testing and handling procedures being used at the installation. Systemic or particular defects in processing a urine sample may provide a basis for appropriate relief. Captain Edward T. Keable.

[86] 31 M.J. 283 (C.M.A. 1990).

[87] United States v. Pollard, 27 M.J. 376 (C.M.A. 1989).

[88] 31 M.J. 289 (C.M.A. 1990).

Examination and New Trials Division Note

Article 69, UCMJ, Application—SJA Commentary

A recent application[1] under the provisions of article 69 of the Uniform Code of Military Justice, illustrates the importance of the staff judge advocate's commentary.[2] The accused had been convicted, in part, of dereliction of duty by missing his permanent change of station (PCS) Military Airlift Command flight from Korea on 21 April 1989. The summary court-martial record, however, was

[1] *Holloway*, SCM 1989/6008 (1990).

[2] Army Reg. 27-10, Legal Services: Military Justice, paras. 14-3*a*(3), (4) (22 Dec. 1989).

was completely devoid of any evidence indicating that the accused had been assigned a flight on his proposed PCS date of 21 April 1989. The record contained only the accused's DA Form 2A, which showed a date of expected return from overseas (DEROS) date of 21 April 1989, and some incomplete clearing papers bearing dates prior to the PCS date. Moreover, the record did not indicate that any witnesses were called to testify.

The accused's application for review under article 69 alleged that the court had insufficient evidence to convict because no evidence was admitted to show that he had a duty to report for a flight on the date in question. The staff judge advocate forwarded the accused's application for review by The Judge Advocate General without complying with the requirements for an SJA's commentary.[3] The accused's conviction for dereliction of duties was set aside because the reviewing authority found no evidence in the record tending to show that the accused actually had a duty to be on a flight on 21 April 1989, or that the accused knew or reasonably should have known of that duty.

Because records of summary courts-martial are brief by nature and do not summarize any testimony, a staff judge advocate, through whom an accused has filed an article 69 application, must address the accused's allegations of error when forwarding the application for review. When an accused challenges a conviction based on insufficiency of proof because no witness testified at trial and because the record included no documentary evidence that the accused committed the offense, the staff judge advocate should obtain the summary court-martial's statement of the basis for conviction or otherwise explain the deficiency in the record. Captain Craig T. Trebilcock.

[3] *Id.*

Clerk of Court Notes

Office of the Clerk of Court

In December 1990, Mr. Robert Anthony (Sergeant First Class, United States Army, retired) became chief of the Records Control and Analysis Branch (JALS-CCR). Telephone numbers to use for administrative questions about records of trial, convening authority actions, and court-martial orders are autovon 289-1636 and -1638. The Special Actions and Statistics Branch (JALS-CCS) is a consolidation of two former branches: For civilian witnesses for overseas trials, call autovon 289-1193; for information about Court-Martial Case Reports, JAG-2 Reports, and military justice statistics, call autovon 289-1790. For questions about Army Court of Military Review decisions and their implementation, release of information from records, and admissions to the bar, call autovon 289-1758. The Judicial Advisor/Clerk of Court's number is autovon 289-1888. Our USALSA Administrative Office fax number is autovon 289-1938. The commercial prefix for all of these is no longer area code 202; instead, use area code 703, followed by the commercial number 756-xxxx.

Attention Staff Judge Advocates

As you can see, we use this column to convey military justice-related information that is important to *legal specialists* and *court reporters*. Please assist us by routing *The Army Lawyer* to yours.

Preparing Records of Trial for Shipment

Each volume of a record of trial should be only one-and-one-half to two inches thick. When a volume exceeds that thickness, the Clerk's office must break the record down and rearrange it because reading through a three-inch volume of letter-size papers fastened at the top simply is unmanageable and because shelving and reshelving thicker volumes obviously is more difficult than with thinner ones. In addition, the first volume of a record normally will begin to grow with appellate papers as soon as the case arrives. Finally, making a thicker volume often requires the interlocking of two prong fasteners. Legal clerks should not stack prong fasteners because the practice destabilizes the volume and makes the volume more likely to come apart in shipment or during use after arrival.

Legal clerks must be extremely careful when they ship records. Recently, we received two multivolume records packed in a box having no top. Only the wrapping paper shielded the records from the outside world. Predictably, the wrapping paper alone was incapable of physically protecting the record and the package tore open en route. Fortunately, Postal Service personnel noticed the damaged package before anything was lost. They sealed the entire carton in clear plastic and delivered it to us. Not very long ago, one jurisdiction had to recopy and reauthenticate several records of trial because their pack-

ages broke open en route and many parts of records were lost. This is not always the sending legal clerk's fault, but poor packing practices—incomplete boxes, inadequate wrapping, records not prevented from shifting in the box, lack of duplicate addresses—will increase the odds of your having to reconstruct an entire record, or more.

Sometimes records are accompanied by audio or video tapes, with copies for appellate counsel as well as the original, when a copy was introduced or offered into evidence. Be sure to label each tape—not merely the box or envelope in which the tape is placed. Tape labels should include your jurisdiction, the accused's name, the exhibit number or letter, the copy number (that is, original, copy 1, copy 2), and a sequence number (for example, 1 of 3) if the exhibit consists of more than one cassette or reel.

Attention Trial Defense Counsel

Defense counsel should include article 38(c) briefs in the record of trial, where they are placed immediately following the accused's election as to appellate representation, before the record is sent to the Clerk of Court, rather than sending them separately. If you have ensured that the article 38(c) brief has been included in the record, no need exists to send a separate copy to this office. If you do send briefs to the Clerk of Court, remember that two copies in addition to the original are required and ensure that you use a method of delivery involving a receipt so that you will know that we received the brief and when it arrived at the Clerk's office.

We continue to receive improperly captioned petitions for extraordinary relief. The caption is not "United States versus (Your Client)." Rather, it is "Your Client" (complete with grade, social security number, and organization), "the Petitioner," versus the party or parties you wish ordered to do something or to stop doing something, "and the United States of America." *See* C.M.R. rule 20(b) and C.M.A. rule 8(f). Counsel can find these rules in volumes 22 and 15, respectively, of West's Military Justice Reporter.

When the petitioner, including one filing *in propria persona*, is subject to the Uniform Code of Military Justice, appellate defense counsel, if requested, immediately are designated to carry on the representation. Under C.M.R. rule 20(f), however, the Court of Military Review is not required to seek additional pleadings or briefs from appellate defense counsel. This rule has been applied even in a case in which government counsel for the respondents had responded to a show-cause order issued by the court. Therefore, if you want affirmative involvement by defense appellate counsel, you should discuss this with them before filing the petition. Afterwards may be too late, especially in cases that the court may regard as patently nonmeritorious or effectively solvable in the course of direct appellate review.

Court-Martial Processing Times, FY 1990

The tables below show the Armywide average processing times for general courts-martial and bad conduct discharge special courts-martial. These tables cover the four quarters of fiscal year 1990. The new programming and design of our quarterly report to the major commands permits us to add processing times for non-bad-conduct discharge special courts-martial and summary courts-martial beginning with the second quarter of the fiscal year.

General Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Clerk of Court	409	441	371	336
Days from charging or restraint to sentence	45	40	41	44
Days from sentence to action	55	53	47	53
Days from action to dispatch	6	6	6	6
Days from dispatch to receipt by the Clerk	12	10	7	8

BCD Special Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Clerk of Court	121	152	86	99
Days from charging or restraint to sentence	30	29	32	28
Days from sentence to action	42	47	44	46
Days from action to dispatch	5	4	6	6
Days from dispatch to receipt by the Clerk	10	9	8	8

Non-BCD Special Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Staff Judge Advocate	UNK	86	74	63
Days from charging or restraint to sentence	UNK	34	35	34
Days from sentence to action	UNK	31	31	38

Summary Courts-Martial

	1st Qtr	2d Qtr	3d Qtr	4th Qtr
Records received by Staff Judge Advocate	UNK	324	257	231
Days from charging or restraint to sentence	UNK	15	13	12
Days from sentence to action	UNK	9	7	7

Fiscal Year Statistics

The accompanying tables compare military justice statistics and court-martial processing times for fiscal year (FY) 1990 with those for FY 1989. Similar information for prior years was published in *The Army Lawyer* in the February 1990 issue (FY 1988-1987) and in the November 1987 issue (FY 1986-1984). In addition, a table showing court-martial and nonjudicial punishment rates for the fourth quarter, FY 1990, is included. Rates for the full year are shown in the military justice table.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES PER THOUSAND

Fourth Quarter Fiscal Year 1990; July-September 1991

	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.42	(1.67)	0.34	(1.37)	0.61	(2.45)	0.31	(1.24)	9.65	(38.59)
BCDSPCM	0.22	(0.87)	0.18	(0.72)	0.32	(1.28)	0.19	(0.76)	0.00	(0.00)
SPCM	0.03	(0.13)	0.03	(0.10)	0.05	(0.19)	0.05	(0.21)	0.00	(0.00)
SCM	0.31	(1.23)	0.28	(1.14)	0.35	(1.41)	0.29	(1.18)	0.77	(3.09)
NJP	22.86	(91.42)	23.13	(92.54)	21.49	(85.97)	27.18	(108.72)	29.07	(116.29)

Note: Based on average strength of 729,307 Figures in parentheses are the annualized rates per thousand

Court-Martial Processing Times

General Courts-Martial

	FY 89	FY 90
Records received by Clerk of Court	1554	1558
Days from charging or restraint to sentence	44	43
Days from sentence to action	53	52
Days from action to dispatch	6	6
Days from dispatch to receipt by the Clerk	11	9

BCD Special Courts-Martial

	FY 89	FY 90
Records received by Clerk of Court	497	458
Days from charging or restraint to sentence	29	30
Days from sentence to action	45	45
Days from action to dispatch	4	5
Days from dispatch to receipt by the Clerk	9	9

MILITARY JUSTICE STATISTICS, FY 1989-1990

General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/1,000
1989	1585	94.5%	87.6%	62.6%	63.8%	24.9%	31.4%	2.08
1990	1451	94.9%	86.7%	60.8%	68.6%	20.2%	24.3%	1.94

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/1,000
1989	850	92.8%	62.6%	63.6%	69.2%	21.5%	26.3%	1.12
1990	771	92.6%	62.3%	64.3%	70.0%	21.2%	22.8%	1.03

Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/1,000
1989	185	80.5%	NA	40.0%	52.4%	36.2%	6.4%	.24
1990	149	75.8%	NA	34.8%	57.0%	31.5%	3.3%	.20

Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate/1,000
1989	1365	94.6%	UNK	10.3%	1.79
1990	1121	95.0%	UNK	7.8%	1.50

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/1,000
1989	83,413	79.9%	20.1%	9.9%	109.44
1990	76,152	79.0%	21.0%	6.0%	101.87

Average strength for rates/1,000: FY 1989—762,233; FY 1990—747,539.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Battery Without Touching the Victim's Person

In *United States v. Bonano-Torres*[1] the Army Court of Military Review reversed the accused's conviction for assault consummated by a battery[2] because the accused did not directly touch the victim's person. This author criticized the court's rationale as being inconsistent with military law as reflected in the Manual for Courts-Martial[3] and decisional authority.[4] The Acting The Judge Advocate General, United States Army, subsequently certified this issue to the Court of Military Appeals,[5] which decided that the Army Court of Military Review erred as a matter of law in reaching that conclusion.[6] The factual circumstances giving rise to the assault charge, and the various courts' application of the law to those facts, are discussed below.[7]

The accused in *Bonano-Torres* was convicted, *inter alia*, of assault and battery by kissing the victim on the lips and by attempting to unbutton her blouse.[8] The court of review found the following to be the operative facts for the assault charge.[9] The accused, a married noncommissioned officer, went on an overnight pay mission with the victim, a female finance clerk who was assigned to assist him.[10] After their duties had been completed, the accused and the victim had dinner, went to a discotheque, and then returned to their hotel (where they had taken separate rooms) and played cards. During the course of the evening, the accused attempted to kiss the victim, but she moved away from him. Later, when the accused managed to kiss the victim, she told him that "they should not do this."[11] The victim reminded the accused that he was a married man, and explained that she had a trusting relationship with her boyfriend that she did not want to jeopardize. The victim told the accused to leave the room, but then relented and continued playing cards with him. The accused thereafter kissed the victim a second time, and unsuccessfully attempted to unbutton her blouse.[12]

The court of review had no difficulty in affirming the accused's conviction for assault and battery based upon the second kiss. Under military law, a battery is "an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm."[13] The unlawful touching must be the result of an intentional or culpably negligent act.[14] Any offensive touching will suffice,[15] even when no physical injury is inflicted. The

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[1] 29 M.J. 845 (A.C.M.R. 1989), *affirmed in part and reversed in part*, 31 M.J. 175 (C.M.A. 1990).

[2] Uniform Code of Military Justice art. 128, 10 U.S.C. § 928 (1982) [hereinafter UCMJ].

[3] Manual for Courts-Martial, United States, 1984, Part IV, paras. 54c(2)(b), (c) [hereinafter MCM, 1984].

[4] *See generally* TJAGSA Practice Note, *The Scope of Assault*, The Army Lawyer, Apr. 1990, at 67.

[5] The certified issue was stated as follows:

> Whether the Army Court of Military Review erred by holding the evidence insufficient as a matter of law to convict appellee for assault and battery because appellee, when he grabbed the victim's button and shirt, did not touch her person.

29 M.J. 463 (C.M.A. 1989).

[6] United States v. Bonano-Torres, 31 M.J. 175 (C.M.A. 1990), *affirming in part and reversing in part*, 29 M.J. 845 (A.C.M.R. 1989).

[7] The accused in *Bonano-Torres* also was convicted of raping a second victim. The Army Court of Military Review reversed that conviction, finding that the victim's testimony that she passively submitted to having sexual intercourse with the accused so he would quit harassing her was not sufficient to show the force and lack of consent required for rape. *Bonano-Torres*, 29 M.J. at 850-51 (citing United States v. Williamson, 24 M.J. 32 (C.M.A. 1987) and United States v. Carr, 18 M.J. 297, 299 (C.M.A. 1984)). The court did recognize, however, that the accused could be guilty of an indecent assault for his initial acts with the victim, and yet not be guilty of rape for the later intercourse. *See* United States v. Wilson, 13 M.J. 247 (C.M.A. 1982); United States v. Perry, 22 M.J. 669 (A.C.M.R. 1986). The court was not convinced beyond a reasonable doubt that the accused was guilty of this lesser offense, however, apparently finding that the accused may have had an honest and reasonable mistake of fact as to the victim's consent. *Bonano-Torres*, 29 M.J. at 851 (citing United States v. Steele, 43 C.M.R. 845, 849-50 (A.C.M.R. 1971) (Finklestein, J., concurring)). *See generally* Milhizer, *Mistake of Fact and Carnal Knowledge*, The Army Lawyer, Oct. 1990, at 3. The correctness of this conclusion also was certified to the Court of Military Appeals, which held that the "Court of Military Review did not legally err in reversing the accused's rape conviction." *Bonano-Torres*, 31 M.J at 176 (citing United States v. Short, 16 C.M.R. 11, 16 (C.M.A. 1954) and Mills v. United States, 164 U.S. 644 (1897)).

[8] *Bonano-Torres*, 31 M.J. at 177. The original assault charge against the accused contained an allegation that he unbuttoned a button on the blouse of the victim. The military judge, however, found the accused guilty of, *inter alia*, only attempting to unbutton a button on the victim's blouse. *Id.* at 180.

[9] Citations in this note to the factual circumstances surrounding the assault charge are to the court of review's opinion, because the facts were developed in more detail therein and formed the predicate for the Court of Military Appeals' opinion.

[10] *Bonano-Torres*, 29 M.J. at 847.

[11] *Id.*

[12] Prior to the second kiss, the victim refused the accused's suggestion that they lie together on the bed. *Id.*

[13] MCM, 1984, Part IV, para. 54c(2)(a).

[14] *See* United States v. Turner, 11 M.J. 784 (A.C.M.R. 1981); MCM, 1984, Part IV, para. 54c(2)(d) ("If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery").

[15] *See* United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (transmitting the AIDS virus to the victim by unprotected and unwarned sex); United States v. Van Beek, 47 C.M.R. 99 (A.C.M.R. 1973) (touching the victim with a noxious and persistent gas).

court of review found in *Bonano-Torres* that the accused was clearly on notice that, at the time of the second kiss, his intentional advances were unwelcomed[16] and could be considered offensive.[17] The court concluded, therefore, that his misconduct satisfied the elements of assault and battery.[18]

The court of review, however, did not find the evidence sufficient to support the accused's conviction for assault and battery for attempting to unbutton the victim's blouse.[19] The court concluded, "In view of the fact that [the accused] did not touch [the victim's] person but only her blouse and the button, we find that such act was not a battery and not part of the assault and battery committed upon her person as required by Article 128, UCMJ."[20]

The Court of Military Appeals found this latter conclusion by the court of review constituted legal error. The court wrote that the lower court's pronouncement conflicted with well-established views on the scope of assault and battery as expressed by criminal law experts[21] and in the Manual.[22] As the author has previously noted in this regard,

> Military law has long recognized that a battery may be inflicted either directly or indirectly. Indeed, the Manual specifically notes that "[i]t may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, ... shoot a person, cause a person to take poison, or drive an automobile into a person." More to the point, the Manual instructs that a battery can be constituted when an accused "cut[s] another's clothes while the person is wearing them though without touching or intending to touch the person." The gravamen of assault by battery is whether the accused caused the victim to be offensively touched, and not whether the touching was perpetrated by the accused directly upon the victim's body.[23]

The Court of Military Appeals observed also that simple assault "does not require a touching or a battery of any kind for conviction. This is quite clear from the face of [article 128]."[24] Accordingly, the court of review's action in striking a portion of the assault specification because the victim was not touched was erroneous. Major Milhizer.

Impersonating a CID Agent and the Overt Act Requirement

Wrongfully and willfully impersonating certain officials historically has been prosecuted under the general article[25] as a violation of military law.[26] Among the officials thus protected by the Uniform Code of Military Justice (UCMJ) are commissioned officers, noncommissioned officers, warrant officers, and petty officers.[27] Also protected are certain other government agents and officials, such as special agents of the Criminal Investigation Command (CID).[28] As the recent case of *United States v. Felton*[29] illustrates, the so-called "overt act" requirement for this offense will vary depending upon the status of the person being impersonated.

The accused in *Felton* falsely told a woman that he was a CID agent.[30] He claimed further that he had "paper-

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[16] Military law long has held that consent not always will operate as a defense to an assault by battery. For example, both parties to a mutual affray are guilty of assault. United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966). *See generally* TJAGSA Practice Note, *Assault and Mutual Affrays*, The Army Lawyer, July 1989, at 40. Moreover, consent will be disallowed as a defense to assault and battery when the injury is more than trifling or the public order is disturbed. United States v. Holmes, 24 C.M.R. 762 (A.F.B.R. 1957); *see* United States v. Dumford, 28 M.J. 836, 839 (A.F.C.M.R. 1989); United States v. Johnson, 27 M.J. 798, 803 (A.F.C.M.R. 1988) (consent by the accused's sex partner rejected as a defense for aggravated assault by having "unsafe" sex when the accused knew he had the AIDS virus). A consensual kiss certainly does rise to the aggravated degree of harm required by *Holmes* and, in any event, would not be offensive.

[17] *Bonano-Torres*, 29 M.J. at 849.

[18] *See generally* MCM, 1984, Part IV. para. 54b(2).

[19] *Bonano-Torres*, 29 M.J. at 849.

[20] *Id.* The court acknowledged that the accused's actions might "be evidence of his intent to commit an indecent assault, an offense not charged." *Id.* at 849; *see* MCM, 1984, Part IV, para. 63 (indecent assault). Assault consummated by a battery is a lesser included offense of indecent assault. MCM, 1984, Part IV, para. 65d(1). Therefore, assault by battery under an attempt theory might be supported by the evidence as construed by the court. The court did not pursue this basis for affirming the accused's conviction for attempting to unbutton the victim's blouse, perhaps because the specification failed to provide notice of the attempt theory and the proof at trial focused upon an offer or a battery theory.

[21] *Bonano-Torres*, 31 M.J. at 180 (citing R. Perkins & R. Boyce, Criminal Law 154 (3d ed. 1982) and W. LaFave & A. Scott, Substantive Criminal Law § 714, at 300 (1986)).

[22] MCM, 1984, Part IV, paras. 54c(2)(b), (c).

[23] TJAGSA Practice Note, *supra* note 4, at 68 (citing MCM, 1984, Part IV, para. 54c(2)(b) & (c)).

[24] *Bonano-Torres*, 31 M.J. at 180.

[25] UCMJ art. 134.

[26] *See* MCM, 1984, Part IV, para. 86; *e.g.*, United States v. Collymore, 29 C.M.R. 482 (C.M.A. 1960); United States v. Demetris, 26 C.M.R. 192 (C.M.A. 1958); United States v. Kupchick, 6 M.J. 766 (A.C.M.R. 1978).

[27] MCM, 1984, Part IV, para. 86b(1).

[28] *E.g.*, United States v. Yum, 10 M.J. 1 (C.M.A. 1980); United States v. Adams, 14 M.J. 647 (A.C.M.R. 1982) (accused, who impersonated a CID agent, was prosecuted under article 134).

[29] 31 M.J. 526 (A.C.M.R. 1990).

[30] *Id.* at 529.

work" showing that she had been unfaithful to her husband. The accused informed the woman that he wanted to meet with her at a trailer park to resolve the matter.[31] When the woman refused, the accused told her that they should meet at a food store or she "would suffer the consequences."[32] The woman understood the latter conversation to be a threat by the accused to inform her husband about her infidelity. The accused's conversations with the woman formed the basis for the charge of wrongfully impersonating a CID agent.[33]

The Manual for Courts-Martial provides that wrongfully impersonating certain officials has three elements of proof:

> (1) That the accused impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government, in a certain manner;
>
> (2) That the impersonation was wrongful and willful;[34] and
>
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[35]

An aggravated form of the offense, which includes an intent to defraud, requires the allegation of that additional element.[36]

The status of the person being impersonated determines the degree to which the government must prove that the accused acted out the impersonation—the so-called overt act requirement. When an accused impersonates a commissioned, warrant, petty, or noncommissioned officer, the government need show only that the accused publicly impersonated the official. As the Court of Military Appeals has recognized, all such officials fall "within the 'category of persons who under the Manual provisions cannot be impersonated with impunity.'"[37] Indeed, because of the unique relationship between "subordinates and superiors [in the military], the adverse impact on good order and discipline of such an impersonation on a military post is self-evident."[38] Thus, falsely and publicly representing oneself as a commissioned officer,[39] or falsely and publicly wearing the uniform of a noncommissioned officer,[40] without more, can satisfy the overt act requirement of an impersonation offense under article 134.[41]

When an accused falsely assumes the status of other officials, such as CID agents, the government additionally must allege and prove an overt act by the accused

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[31] The accused later acknowledged that he had used the trailer park for his extramarital liaisons. *Id.*

[32] *Id.*

[33] At trial, the accused denied that these conversations ever took place. *Id.*

[34] Willfulness, as used in this context, requires that the accused know that he is impersonating a particular official. *Demetris*, 26 C.M.R. at 194. Accordingly, state of mind defenses, such as voluntary intoxication, may negate guilt. *Id.* at 195. *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 154 (1990).

[35] MCM, 1984, Part IV, para. 86b. The third element merely reflects the general requirement for all article 134 offenses tried under the first two clauses of that article. *See id.*, Part IV, para. 60b(2). *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

[36] *See Collymore*, 29 C.M.R. at 483-84. The Manual provides that if intent to defraud is in issue, the following element of proof is inserted as the new third element: "That the accused did so with the intent to defraud a certain person or organization in a certain manner." MCM, 1984, Part IV, para. 86b n.1. This aggravated form of impersonation subjects the accused to a substantially greater maximum potential punishment. The maximum punishment for impersonation with intent to defraud includes a dishonorable discharge, total forfeitures, and confinement for three years. *Id.*, Part IV, para. 86e(1). The maximum punishment for impersonation without an intent to defraud is limited to a bad-conduct discharge, total forfeitures, and confinement for six months. *Id.*, Part IV, para. 86e(2).

[37] United States v. Pasha, 24 M.J. 87, 92 (C.M.A. 1987) (quoting *Yum*, 10 M.J. at 5 (Everett, C.J., concurring in the result)); *accord* United States v. Reece, 12 M.J. 770, 772 (A.C.M.R. 1981).

[38] *Pasha*, 24 M.J. at 92. As the Court of Military Appeals explained nearly 40 years ago in United States v. Messenger, 6 C.M.R. 21 (C.M.A. 1952):

> The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder, and lack of discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank.

Id. at 24-25; *see* W. Winthrop, Military Law and Precedents 727 (2d ed. 1920 Reprint) (assuming the rank of a superior—for example, as a lieutenant or captain—is included as a neglect and disorder under the precursor of article 134 without reference to the accused deriving a benefit therefrom).

[39] United States v. Frisbie, 29 M.J. 974 (A.F.C.M.R. 1990); *Reece*, 12 M.J. at 772.

[40] *Pasha*, 24 M.J. at 91-92.

[41] *Frisbie*, 29 M.J. 974 (A.F.C.M.R. 1990). *See generally* TJAGSA Practice Note, *Impersonating an Officer and the Overt Act Requirement*, The Army Lawyer, July 1990, at 42. Of course, evidence that the accused derived a benefit from the impersonation would be relevant as an aggravating matter on sentencing. *See* MCM, 1984 Part IV, para. 86c(1). *See generally id.*, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.]. Likewise, such evidence might support the accused's conviction for other offenses. For example, wrongfully obtaining money or the property of another by means of impersonating an official, with the intent permanently to defraud the owner of the money or property of its use and benefit, could constitute larceny under a false pretenses theory. UCMJ art. 121; MCM, 1984, Part IV, para. 46c(1)(e). *See generally* United States v. Carter, 24 M.J. 280, 282 (C.M.A. 1987). Under these circumstances, however, a multiplicity issue as to the impersonation offense and the larceny by false pretenses offense would likely arise. *See generally* United States v. Baker, 14 M.J. 361 (C.M.A. 1983); R.C.M.907(b)(3)(B); R.C.M. 1003(c)(1)(C); R.C.M. 307(c)(4) discussion.

beyond mere impersonation. As Judge Fletcher wrote in *United States v. Yum*,[42] the government must in those cases "not only alleg[e] and show[] a pretense of authority, but also [allege and show] an act which 'must be something more than merely an act in keeping with the falsely assumed character.'"[43] Accordingly, when the accused is alleged to have impersonated one of these officials without an intent to defraud, the specification must allege, and the evidence must establish, that "the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have."[44]

The court in *Felton* concluded that these requirements for pleading and proving the accused's wrongful impersonation of a CID agent were satisfied. As to the adequacy of the specification, the court noted that it stated the accused "declared himself to be a CID agent, informed [a woman] that he had evidence of her adultery, and informed her that she would 'suffer the consequences' if she did not meet him later that night."[45] Thus, the specification alleged that the accused did more than merely assume the status of a CID agent; it alleged that he used the assumed status "in an attempt to intimidate" the woman to meet him later that evening.[46] In sum, the specification alleged all the elements of proof, provided notice to the accused of what to defend against, and protected the accused against reprosecution for the same offense.[47] It was, therefore, adequate in all respects.

As to the sufficiency of the evidence, the court in *Felton* found that the evidence presented by the government proved all of the allegations in the specification beyond a reasonable doubt.[48] As the court put it, "We are satisfied that the evidence establishes an overt act beyond mere pretense of authority; it establishes that the [accused] used his pretense of authority as a means of intimidating [a woman] into meeting with him."[49]

Felton teaches some important lessons. Trial practitioners must be aware of the different overt act requirements for impersonation offenses, based upon the status of the official being impersonated. These distinct requirements must be recognized and applied when drafting and reviewing specifications that allege wrongful impersonation. They are also important in determining the requirements of proof for this crime. Major Milhizer.

Alleging the Overt Act in an Attempt Specification

The seminal military case addressing the adequacy of specifications is *United States v. Sell*.[50] In *Sell* the Court of Military Appeals announced the following three-part test for assessing the adequacy of a specification:

> The true test of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.[51]

The military courts have interpreted the first component of the *Sell* test as requiring that all the elements of an offense be alleged either directly or by fair implication.[52] An exception to this rule, however, is recognized for attempts.[53]

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[42] 10 M.J. 1 (C.M.A. 1980).

[43] *Id.* at 4 (quoting United States v. Rosser, 528 F.2d 652, 657 (D.C. Cir. 1976)); *accord Adams*, 14 M.J. 647 (A.C.M.R. 1982). Chief Judge Everett concurred in the result, finding that the accused must "to some extent have played the role of the person impersonated" in order to be guilty of this offense. *Id.* at 4, 5 (Everett, C.J., concurring). Judge Cook dissented, concluding that the accused "cloaked himself in the mantle of a CID agent, not as mere puffery of position, but for some special benefit he thought might accrue to him." *Id.* at 6 (Cook, J., dissenting).

[44] MCM, 1984, Part IV, para. 86b n.2; *Yum*, 10 M.J. at 4.

[45] *Felton*, 31 M.J at 530.

[46] *Id.*

[47] *See generally* United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953).

[48] *Felton*, 31 M.J. at 530.

[49] *Id.*

[50] 11 C.M.R. 202 (C.M.A. 1953).

[51] *Id.* at 206.

[52] In United States v. Brown, 42 C.M.R. 656 (A.C.M.R. 1970), for example, the Army Court of Military Review concluded that the terms "Patton Enlisted Men's Club" and "Mainz Officers' and Civilians' Open Mess" alleged a building or structure, by fair implication, for purposes of housebreaking. *See* UCMJ art. 130. In United States v. Knight, 15 M.J. 202 (C.M.A. 1983), on the other hand, the Court of Military Appeals decided that the words "burglariously enter," as used in a burglary specification, did not allege by fair implication that the accused's misconduct included a "breaking and entering" as required for that offense. *See* UCMJ art. 129.

[53] UCMJ art. 80.

The Manual for Courts-Martial provides that attempts under article 80 have four elements of proof:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.[54]

Although the overt-act requirement is thus an element of proof for all attempt offenses,[55] military decisional law has long accepted specifications alleging attempts under article 80 "which neither directly nor indirectly provides for allegation of an overt act purporting to constitute the attempt."[56] Likewise, the sample specification for attempts in the Manual does not require that the overt act be pleaded.[57]

In the recent case of *United States v. Mobley*,[58] the Court of Military Appeals reiterated that an attempt specification need not allege an overt act to state an offense under article 80.[59] The court acknowledged that the better practice in *Mobley* would have been for the military judge to grant the defense's request for a bill of particulars.[60] The court concluded, however, that trial counsel's actions in furnishing the accused a complete list of witnesses and the evidence the government intended to introduce constituted the "functional equivalent" of a bill of particulars.[61]

Mobley highlights another apparent inconsistency with respect to pleading attempts. Although the overt act sufficient for conspiracy[62] can be mere preparation,[63] the act must be alleged expressly in a conspiracy specification.[64] Of course, the government may allege several overt acts in the conspiracy specification and need only prove one.[65] This seems to be inconsistent with the law regarding attempts, in that the overt act necessary for an attempt must be more than mere preparation[66] but need not be alleged. Major Milhizer.

An Anonymous Note Can Constitute a False Official Statement

Introduction

Starting with *United States v. Jackson*,[67] decided in 1988, the Court of Military Appeals significantly expanded the scope of false official statements under military law.[68] With its recent decision in *United States v. Ellis*,[69] the court has again broadly construed the reach of article 107, such that an anonymous note prepared by the accused was found to constitute a false official statement. Before discussing *Ellis* in detail, a brief review of the earlier decisional law pertaining to article 107 is appropriate.

Decisional Law Prior to Ellis

Article 107 provides: "Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct."[70] According to the Manual for Courts-Martial, the offense has the following four elements of proof:

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[54] MCM, 1984, Part IV, para. 4b.

[55] *See generally* United States v. Byrd, 24 M.J. 286, 288-90 (C.M.A. 1987).

[56] United States v. Marshall, 40 C.M.R. 138, 143 (C.M.A. 1969).

[57] MCM, 1984, Part IV, para. 4f. The sample specification does provide, however, that the offense should be described "with sufficient detail to include expressly or by necessary implication every element." *Id.*

[58] 31 M.J. 273 (C.M.A. 1990).

[59] *Id.* at 278.

[60] *See generally* RCM 906(b)(6) and discussion.

[61] *Mobley*, 31 M.J. at 278.

[62] UCMJ art. 81.

[63] MCM, 1984, Part IV, para. 5c(4)(b).

[64] *Id.*, Part IV, para. 5f; *see* United States v. McGlothin, 44 C.M.R. 533 (A.C.M.R. 1971) (conspiracy to commit pandering specification was fatally deficient because it failed to allege an overt act either directly or by necessary implication). A variance between the pleading and the proof, however, is generally not fatal.

[65] *See generally* United States v. Reid, 31 C.M.R. 83 (C.M.A. 1961).

[66] *Byrd*, 24 M.J. 286, 288-90 (C.M.A. 1987).

[67] 26 M.J. 377 (C.M.A. 1988).

[68] UCMJ art. 107.

[69] 31 M.J. 26 (C.M.A. 1990).

[70] UCMJ art. 107.

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.[71]

In interpreting the scope of false official statement offenses under the UCMJ, the Court of Military Appeals has long recognized the existence of a "general analogy" between article 107 and section 1001, title 18 of the United States Code (18 U.S.C.), which prohibits the knowing and willful making of a "false ... or fraudulent statement" concerning "any matter within the jurisdiction of any department or agency of the United States."[72] Under its early holdings in the late 1950's,[73] the court found that a service member must have an independent duty to account or answer questions for his false statements to constitute an article 107 violation.[74] In 1974 the court, in *United States v. Collier*,[75] distinguished this earlier line of cases, concluding that no independent duty to account was required for an article 107 violation if the accused falsely reported a crime.[76] The court in *Collier* reiterated that its interpretation of article 107 was based upon the interpretation then given to 18 U.S.C. section 1001 by the federal civilian courts.[77] *Collier*, however, did not expressly overrule the *Aronson-Osborne* line of cases. Actually, as recently as 1980, the court seemingly continued to require that the accused have an independent duty to account to be guilty of an article 107 violation.[78]

The court's interpretation of article 107 was dramatically changed with *United States v. Jackson*.[79] In *Jackson* an acquaintance of the accused was suspected of committing a recent homicide.[80] As the accused and the suspect knew each other, and as an automobile linked to the suspect was seen in the vicinity of the accused's apartment, the accused was approached by a CID agent to be interviewed. After the agent identified himself and told the accused that he was investigating a homicide, he asked the accused when she had last seen the acquaintance. The accused responded, "Two weeks ago."[81] Later, confronted by evidence that pointed to the acquaintance's recent presence in her quarters,[82] the accused admitted that her answer was false and that the acquaintance had been in her quarters at about 0300 that morning.[83]

The court in *Jackson* again looked to 18 U.S.C. section 1001 in deciding whether the accused's remarks constituted a false official statement.[84] In particular, the court considered and applied the recent Supreme Court decision in *United States v. Rodgers*.[85] In *Rodgers* the Supreme Court concluded unanimously that a defendant's making false reports to the Federal Bureau of Investigation (FBI) "that his wife had been kidnapped," and to the Secret Service that she had been "involved in a plot to kill the President," was a "matter within the jurisdiction" of a department or agency of the United States.[86] The Supreme Court held that "[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under sec. 1001."[87] According to the Supreme Court, a statutory basis existed for the authority of the FBI and the Secret Service to conduct investigations based upon the defend-

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[71] MCM, 1984, Part IV, para. 31b.

[72] United States v. Hutchins, 18 C.M.R. 46, 50 (C.M.A. 1955). The courts have found the quoted language to be the substantial equivalent of "official" as used in article 107. United States v. Aronson, 25 C.M.R. 29 (C.M.A. 1957); *accord* United States v. Ragins, 11 M.J. 42 (C.M.A. 1981).

[73] For an interesting discussion of the military's decisional law prior to the mid-1950's, see United States v. Goldsmith, 29 M.J. 979, 980-83 (A.F.C.M.R. 1990).

[74] United States v. Osborne, 26 C.M.R. 235 (C.M.A. 1958); United States v. Aronson, 25 C.M.R. 29 (C.M.A. 1957). These decisions established the so-called *Aronson-Osborne* line of cases.

[75] 48 C.M.R. 789 (C.M.A. 1974).

[76] *Id.* at 790-91.

[77] *Id.* (citing United States v. Bedore, 455 F.2d 1109 (9th Cir. 1967), and United States v. Adler, 380 F.2d 917 (2d Cir. 1967)).

[78] United States v. Davenport, 9 M.J. 364, 367-68 (C.M.A. 1980).

[79] 26 M.J. 377 (C.M.A. 1988).

[80] *Id.* at 378.

[81] *Id.*

[82] The CID agent found fresh blood in the quarters. *Id.* at 378 n.2.

[83] *Id.* at 378.

[84] *Id*; *see supra* note 73.

[85] 466 U.S. 475 (1984).

[86] *Id.* at 479.

[87] *Id.* at 481 (quoting Bryson v. United States, 396 U.S. 64, 71 (1969) (footnote omitted)).

ant's false reports. Since *Rodgers* was decided, 18 U.S.C. section 1001 has been construed broadly by the federal civilian courts.[88]

In *Jackson* the Court of Military Appeals decided to interpret article 107 in a manner consistent with *Rodgers*.[89] Construed in this way, the court affirmed the accused's conviction for a false official statement for providing false or misleading information about a criminal suspect's whereabouts to a law enforcement investigator. The court concluded that "even if not subject to an independent 'duty to account,' a servicemember who lies to a law-enforcement agent conducting an investigation as part of his duties violates Article 107."[90]

As this author previously noted:

> The *Jackson* decision thus expands the scope of article 107 in several important respects. First, it clearly establishes that a false or misleading statement to a person conducting an official investigation constitutes a false official statement. Article 107 would apparently reach statements given by either suspects or witnesses, sworn or unsworn, regardless of who initiated the investigation....
>
> Second, the *Jackson* decision finds that the scope of article 107 reaches statements which are misleading, even if not technically false. This expansive application is distinguishable from the court's more restrictive interpretation of false swearing under article 134. Unlike the broad scope of article 107 as determined in *Jackson*, the court has held that a literally true but misleading response to a question cannot serve as the basis for a false swearing conviction.[91]

Post-*Jackson* decisions by the military's appellate courts have continued to construe the scope of article 107 quite broadly. In *United States v. Harrison*,[92] for example, the Court of Military Appeals affirmed the accused's conviction for an article 107 violation based upon his false responses to the questions of a battalion finance clerk regarding the authorship of a commander's purported signature on a pay inquiry form.[93] Similarly, in *United States v. Sievers*[94] the Court of Military Appeals affirmed the accused's conviction for an article 107 violation for falsely completing an incident/complaint report.[95] Finally, in *United States v. Goldsmith*[96] the Air Force Court of Military Review concluded that the accused's false responses to a cashier regarding his officers' club account constituted a false official statement within the scope of article 107. In all three cases, the courts focused upon the officiality of the inquiry, and not upon the duty of the accused, as being the crucial factor in deciding whether the accused's conduct amounted to an article 107 offense.

The Case of United States v. Ellis

The accused in *Ellis*[97] was responsible for maintaining aircraft survival kits.[98] An inspection of the kits for which the accused was responsible revealed that some of the life rafts would not function because of improper storage.[99] As a consequence, the accused was decertified as a specialist and had administrative discharge action initiated against him.[100] On the eve of the accused's discharge, he tampered with the life rafts in two aircraft so that they would not function properly in an emergency. The accused, with the help of his girlfriend, then wrote an anonymous note wherein the author accepted blame for the improperly stored survival kits that were the basis of

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[88] *See* United States v. Plasencia-Orozco, 768 F.2d 1074 (9th Cir. 1985) (defendant lied to federal magistrate performing administrative function); United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir.), *cert. denied*, 473 U.S. 913 (1985) (defendant lied to probation officer in pre-plea interview); United States v. Morris, 741 F.2d 188 (8th Cir. 1984) (defendant lied to Internal Revenue Service agent).

[89] *Jackson*, 26 M.J. at 379.

[90] *Id.*

[91] TJAGSA Practice Note, *Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ*, The Army Lawyer, Nov. 1988, at 38, 39 (footnotes omitted).

[92] 26 M.J. 474 (C.M.A. 1988).

[93] Harrison suggests that the accused's statements to the clerk were official because they "related to her job." *Id.* at 476. The precedential import of *Harrison* should be viewed with caution, however, because the court considered the article 107 question in the context of the providence of the accused's guilty plea to making a false official statement.

[94] 29 M.J. 72 (C.M.A. 1989).

[95] The accused in *Sievers* was a base security officer. *Id.* at 73. He and another sailor stole some electronic equipment and a rifle. The accused later filled out an incident/complaint report regarding the theft in his capacity as a security officer. The accused indicated in the report that the identity of the suspects were "unknown." This was clearly false, because the accused knew the identity of the other sailor and was aware of his own participation in the theft. Again, the precedential import of *Sievers* is unclear because the article 107 issue was presented to the Court of Military Appeals in the context of a guilty plea.

[96] 29 M.J. 979 (A.F.C.M.R. 1990).

[97] 31 M.J. at 26 (C.M.A. 1990).

[98] *Id.*

[99] *Id.* at 26-27.

[100] *Id.* at 27.

the accused's elimination action, explained that the kits were sabotaged so that the accused would be moved out of the section, and alerted the reader to the other kits, which the author had "messed up the same way" as he had done to the accused's kits. The accused distributed copies of the note to his first sergeant and two other persons.[101] As a result, the aircraft mentioned in the note were inspected and found to contain problems with their survival kits.[102]

In assessing whether the anonymous note written by the accused was a false official statement within the meaning of article 107, the court again referred to its *Jackson* decision and the "parallel" construction of article 107 and the federal civilian statute as interpreted by the Supreme Court in *Rodgers*.[103] The court then observed that the accused intended that the first sergeant and others take official action—that is, inspect aircraft—as a result of his note; that the desired official action would almost certainly be undertaken immediately, even though it would be based on an anonymous note; and that further official action—that is, favorable personnel action for the accused—would likely follow as a result of the inspection.[104] As the court concluded:

> Appellant believed that official action would be taken by the recipients of the anonymous letter which stated that two of the survival kits were "messed up." He cannot complain now that his anonymous letter is treated as an "official" statement when Air Force personnel, acting within the scope of their official duties, took action based thereon.[105]

Conclusion

The court's expansive interpretation of article 107—starting with *Jackson* and continuing through *Ellis*—has had, and will continue to have, an important practical impact on the administration of military justice. Commanders now have a firm basis for proceeding against soldiers who mislead investigators, even if done so with anonymity. As a consequence, trial counsel need no longer resort to charging such misconduct under other, more doubtful theories of prosecution, such as obstruction of justice[106] or a general disorder.[107] Moreover, because commanders have a preeminent law enforcement role in the military justice system,[108] false or misleading statements to them when they are acting in that capacity can constitute article 107 violations.[109] Finally, false official statements can be made in the context of either criminal or administrative investigations, provided that the investigation is official. In this regard, guilt does not turn upon whether the accused initiated the official inquiry or merely reacted to an on-going investigation.

Of course, not every anonymous statement or note will amount to an article 107 violation. As *Ellis* suggests, the statement must, at a minimum, be related to an official investigation or other official action. In addition, if the anonymous statement is the genesis of the investigation, *Ellis* seems to require both that the accused intended to cause the investigation by his anonymous statement and that the investigation is a reasonably foreseeable consequence of the statement. The court in *Ellis* also expressly reserved whether a false report, made in response to an active solicitation, creates criminal liability under article 107.[110]

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[101] Copies also were delivered to the area defense counsel and the Commandant of the Fighter Weapons School. *Id.* at 28 (Sullivan, J., concurring).

[102] As the Court of Military Appeals observed, the accused "apparently had hoped that, by means of the anonymous note, he would be able to exculpate himself with respect to his previous failure, avert the pending administrative discharge, and obtain his restoration to his prior duties. Instead, his actions resulted in his trial by court-martial." *Id* at 27.

[103] *Id.* The court also cited to *Collier*, 48 C.M.R. at 791, wherein it upheld the accused's conviction under article 107 for falsely reporting to the military police that his car stereo had been stolen. *See supra* notes 73-75 and accompanying text.

[104] *Ellis*, 31 M.J. at 27-28.

[105] *Id.* at 28.

[106] *See* MCM, 1984, Part IV, para. 96. Although the Manual provision for obstruction of justice is broader than the federal statute, United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982), it never has been applied to reach conduct similar to that at issue in *Jackson*. *See, e.g.*, United States v. Long, 6 C.M.R. 60 (C.M.A. 1952) (assaulting a witness who has testified); United States v. Rosario, 19 M.J. 698 (A.C.M.R. 1984), and United States v. Rossi, 13 C.M.R. 896 (A.F.B.R. 1953) (intimating potential witnesses without regard to whether a firm decision to testify had been made); United States v. Chadkowski, 11 M.J. 605 (A.F.C.M.R. 1981) and United States v. Dominger, 31 C.M.R. 521 (A.F.B.R. 1961) (intimidating a witness who was to appear before an UCMJ article 32 investigating officer); United States v. Deloney, 44 C.M.R. 367 (A.C.M.R. 1971) (attempting to influence a witness to retract a statement); United States v. Favors, 48 C.M.R. 873 (A.C.M.R. 1974) (concealing potential evidence pertaining to an alleged criminal offense by another); *Rosario*, 19 M.J. 698 (A.C.M.R. 1984) and United States v. Caudill, 10 M.J. 787 (A.F.C.M.R. 1981) (threatening a person who understood the threat as an inducement to testify falsely if he was called as a witness); United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1983) (attempting to have a witness provide a false alibi).

[107] United States v. Kellough, 19 M.J. 871 (A.F.C.M.R. 1985) (not obstruction of justice to "plant" evidence when no criminal proceeding was pending; offense is a disorder under UCMJ article 134).

[108] United States v. Reeves, 21 M.J. 768, 769 (A.C.M.R. 1986) ("Further, *it is a commander*, and not the provost marshal or criminal investigation division chief, *who is primarily responsible for discipline, law and order within his command.* Arguments to the contrary do not impress this court.") (emphasis in original).

[109] *See* United States v. Cummings, 3 M.J. 246 (C.M.A. 1977) (false statement to a sergeant concerning vehicle registration on post does not violate article 107 because the pertinent Army regulation imposes the responsibility on the unit commander to ensure compliance with registration requirements).

[110] *Ellis*, 31 M.J. at 28 (citing Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988)). The issue, as framed by the court, is whether an accused who makes a false report under such circumstances enjoys "an implicit and binding promise of immunity with respect to such report." *Id.*

Even with these reservations and limitations, the clear trend in the decisional law is toward an increasingly expansive interpretation of article 107. Practitioners faced with potential article 107 violations must become familiar with the recent court decisions that embody this trend. Only with this knowledge can practitioners intelligently anticipate and apply the law relating to false official statements. Major Milhizer.

Negligent Homicide and a Military Nexus

Introduction

Two years ago, in *United States v. Billig*,[111] the Navy-Marine Corps Court of Military Review left unresolved whether military medical personnel could be guilty of negligent homicide[112] committed in the course of medical treatment.[113] This issue, as characterized by the court, seemingly raised the larger question of whether a service member could be convicted of negligent homicide when his conduct lacked a distinctly military character.[114] This question has apparently been answered by the recent Court of Military Appeal's opinion in *United States v. Gordon*.[115] Before discussing *Gordon* in detail, a brief review of negligent homicide generally is appropriate.

Negligent Homicide Generally

Negligent homicide is not expressly proscribed by the UCMJ;[116] instead, it is prosecuted under the first two clauses of the general article[117] as conduct prejudicial to good order and discipline or conduct of a nature to bring discredit upon the armed forces.[118] The Manual describes the gist of the offense as follows: "Negligent homicide is any unlawful homicide which is the result of simple negligence.[119] An intent to kill or injure is not required."[120]

Negligent homicide has five elements of proof:

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful;

(4) That the act or failure to act of the accused which caused death amounted to simple negligence; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[121]

Decisional law has required further that the accused's negligence be the proximate cause of the victim's death.[122]

Although simple negligence is not a recognized basis for a homicide conviction in most civilian jurisdictions,[123] negligent homicide remains a viable offense under military law.[124] Indeed, the Court of Military

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[111] 26 M.J. 744 (N.M.C.M.R. 1988).

[112] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 85.

[113] *Billig*, 26 M.J. at 747 (assignment of error V). The court concluded that "[s]ince the resolution of the case is based on our reasonable doubt as to guilt, all other assignments of error are moot." *Id.* at 747 n.1.

[114] *See id.* at 748 n.1 (citing United States v. Kick, 7 M.J. 82 (C.M.A. 1979)).

[115] 31 M.J. 30 (C.M.A. 1990).

[116] All other forms of homicide under military law are proscribed expressly by UCMJ article 118 (murder) and UCMJ article 119 (manslaughter). Nevertheless, the Court of Military Appeals expressly has rejected the contention that negligent homicide is, therefore, preempted by articles 118 and 119. *Kick*, 7 M.J. at 85.

[117] UCMJ art. 134.

[118] *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66, 67-68.

[119] The Manual defines simple negligence, in the context of negligent homicide, as

> the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence.

MCM, 1984, Part IV, para. 85c(2) (citing *id.*, Part IV, para. 44c(2)(a)).

[120] *Id.*, Part IV, para. 85c(1).

[121] *Id.*, Part IV, para. 85b.

[122] United States v. Romero, 1 M.J. 227, 229-30 (C.M.A. 1975) (an accused can be guilty of negligent homicide only if his actions proximately caused the victim's death; a contributing cause is deemed to be proximate only if it plays a material role in the victim's death); United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983) (proximate cause does not mean the sole cause, but it does mean a material and foreseeable cause); *see* United States v. Russell, 14 C.M.R. 114, 118 (C.M.A. 1954).

[123] *See generally Kick*, 7 M.J. at 83-84 nn.3-4 (and the authorities cited therein).

[124] As a practical matter, negligent homicide often is found as a lesser included offense of more serious forms of homicide, such as involuntary manslaughter under a culpable negligence theory. *See* UCMJ art. 119b(1); MCM, 1984, Part IV, para. 44d(1)(d). *See generally* TJAGSA Practice Note, *Involuntary Manslaughter Based Upon an Assault*, The Army Lawyer, Aug. 1990. at 32.

Appeals repeatedly has affirmed negligent homicide convictions despite appellate attacks upon the validity and constitutionality of the offense.[125] Moreover, the Supreme Court recently has denied certiorari on the issue of whether negligent homicide is a valid offense under military law.[126]

Prior to *Gordon*, the most comprehensive recent discussion of negligent homicide by the Court of Military Appeals was found in *United States v. Kick*.[127] In *Kick* the Court of Military Appeals justified the validity of prosecuting negligent homicide as a violation of the general article in the following terms:

> There is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.[128]

Consistent with the reasoning in *Kick*, most of the reported negligent homicide cases have involved death as the result of activities having a distinct military nexus. In *United States v. Zukrigl*,[129] for example, the victim died as the result of the accused's negligent supervision of a water-crossing exercise. In *United States v. Cuthbertson*[130] the victim was killed because of the accused's negligent operation of a military aircraft. Even in cases in which the death is not connected directly to military activities, a discernable nexus to the military functions and duties usually can be found.[131]

Despite the fact that most negligent homicide cases arise in the context of activities having a distinct military character, a "military nexus" never has been required explicitly as an element of proof for negligent homicide, even after *Kick*.[132] Similarly, in no reported case has an accused's conviction for negligent homicide been reversed because of the government's failure to show that the accused's conduct had a predominately military character.

Citing *Kick*, the Navy-Marine Corps Court of Military Review in *Billig* seemed to suggest, however, that a military nexus might be a prerequisite for a negligent homicide conviction. After noting that "Commander Billig is the only physician in the history of both military and civilian criminal law in the United States to be convicted of negligent homicide for simple negligence during the course of patient treatment or surgery,"[133] the court in *Billig* wrote that "[o]ur concern is whether such a result is permissible under Article 134, UCMJ."[134] Although the circumstances of Billig's treatment were related to military duties,[135] the medical procedures themselves lacked any distinctive or unique military character. Because of the Navy-Marine Corps court's reference in footnote 1 to civilian criminal law and its citation to *Kick*, some have interpreted *Billig* to imply that a "military nexus" should be required for negligent homicide under the UCMJ.[136]

United States v. Gordon

The implication that negligent homicide should have a "military nexus" requirement was put to rest in *United States v. Gordon*.[137] In *Gordon* the accused and two other soldiers rented a small rowboat from a civilian facility in Germany.[138] The victim asked the vendor for a safety jacket, but none were available. The victim also informed

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[125] *E.g.*, United States v. Cozart, 22 M.J. 113 (C.M.A. 1986) (summary disposition); *Kick*, 7 M.J. 82 (C.M.A. 1979); United States v. Kirchner, 4 C.M.R. 69 (C.M.A. 1952).

[126] United States v. Spicer, 20 M.J. 188 (C.M.A.) (summary disposition), *cert. denied*, 474 U.S. 924 (1985).

[127] 7 M.J. 82 (C.M.A. 1979).

[128] *Id.* at 84 (quoting United States v. Ballew, CM 434077 (A.C.M.R. 16 July 1976) (unpub.), slip op. at 2).

[129] 15 M.J. 798 (A.C.M.R. 1983).

[130] 46 C.M.R. 977 (A.C.M.R. 1972).

[131] *E.g.*, United States v. Greenfeather, 32 C.M.R. 151 (C.M.A. 1962) (victims killed when a military vehicle driven by the accused collided with the car they occupied); *Kirchner*, 4 C.M.R. 69 (C.M.A. 1952) (negligently shooting a fellow Marine aboard ship); *Perez*, 15 M.J. 585 (A.C.M.R. 1985) (accused's child died from injuries inflicted by a babysitter who previously had abused the child; accused left the child in the babysitter's care when she was unexpectedly called to duty). *But see, e.g., Russell*, 14 C.M.R. 114 (C.M.A. 1954) (victim killed when the accused operated a civilian vehicle while drunk; only apparent military connection was that the victim was a soldier and the incident occurred just outside the gate of an installation in Germany); *Romero*, 1 M.J. 227 (C.M.A. 1975) (victim died as a result of a drug overdose injected by the accused; only apparent military connection was that the victim was a service member and the incident took place in front of other service members on a military installation).

[132] That is, no military nexus has been required beyond the nexus needed to allege and prove an offense under the first two clauses of article 134.

[133] *Billig*, 26 M.J. at 748 n.1.

[134] *Id.* (citing *Kick*, 7 M.J. 82 (C.M.A. 1979)). The court also questioned "whether the notice requirements of Article 134, UCMJ, have been met under these circumstances." *Billig*, 26 M.J. 748 n.1 (citing Parker v. Levy, 417 U.S. 733 (1974), and United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985)).

[135] The treatments and surgical procedures performed or supervised by Billig that lead to his convictions for negligent homicide were performed at military medical facilities upon retired service members. *Billig*, 26 M.J. at 750-57.

[136] In discussions with judge advocates—especially those in the Navy—the author has found that many have interpreted *Billig* to require a "military nexus" for negligent homicide.

[137] 31 M.J. 30 (C.M.A. 1990).

[138] *Id.* at 32.

the accused that he could not swim. The accused saw that the victim was wearing a 2.5-pound weight on each ankle. After moving onto a lake, the accused and the third soldier began splashing water at each other, diving from the boat, and climbing back into it. Because of these activities the boat took on water and began to sink. When someone suggested that they swim to the nearby shoreline, the victim again stated that he could not swim. The boat then capsized. The victim died by drowning.[139]

The Court of Military Appeals first concluded that, based upon these facts, a rational court member could find beyond a reasonable doubt that the accused's conduct constituted simple negligence.[140] The court next determined that the accused's actions were a proximate cause of the victim's death—that is, that the "evidence was sufficient for the members to find that [the accused's] conduct played a material role in [the victim's] drowning."[141]

Finally, the court had no hesitation in affirming the accused's conviction even though his activities causing the victim's death lacked a distinct "military nexus."[142] Citing *Kick*, the court in *Gordon* reiterated that "homicide by simple negligence is an offense under Article 134 of the Uniform Code of Military Justice."[143] The court observed further that the broad scope of the Supreme Court's decision in *Solorio v. United States*,[144] which held that service connection is no longer a prerequisite for court-martial jurisdiction, "does not alter our holding in this regard."[145] The court in *Gordon* thus seemingly has rejected any special "military nexus" requirement for negligent homicide, despite the language in *Kick* and *Billig* that suggests otherwise.

Conclusion

Gordon makes clear that negligent homicide does not require that the accused's conduct causing the victim's death have a distinctively military character. Notwithstanding the quoted language from *Kick*, activities such as drunken driving, drug ingestion, and boating accidents may support a negligent homicide conviction even when no predominant military connection is established. The gravamen of negligent homicide remains an unlawful killing by simple negligence; the civilian or military character of the accused's negligence is not legally relevant to the issue of guilt.

Of course, the concept of a "military nexus" retains some importance with respect to negligent homicide notwithstanding the result in *Gordon*. As with any other article 134 offense charged under the first two clauses, negligent homicide requires that the government establish that the accused's conduct was either prejudicial to good order and discipline or was service discrediting.[146] These matters necessarily require a military connection of some sort. *Gordon* makes clear, however, that no special "military nexus" unique to negligent homicide need be pleaded or proved. Major Milhizer.

Sodomy and the Requirement for Penetration

Article 125 of the Uniform Code of Military Justice[147] proscribes sodomy, in part, as follows: "Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy."[148] The statute provides further that "[p]enetration, however slight, is sufficient to complete the offense."[149] As the Manual for Courts-Martial explains with respect to the penetration requirement:

> It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.[150]

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[139] The facts were disputed regarding whether the accused and the third soldier attempted to rescue the victim. *Id.*

[140] *Id.* at 34-35 (citing United States v. Dellarosa, 30 M.J. 255 (C.M.A. 1990)).

[141] *Gordon*, 31 M.J. at 35 (citing *Romero*, 1 M.J. 227 (C.M.A. 1975); United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990); and United States v. Cooke, 18 M.J. 152 (C.M.A. 1984)).

[142] *See generally supra* note 128 and accompanying text.

[143] *Gordon*, 31 M.J. at 35.

[144] 483 U.S. 435 (1987).

[145] *Gordon*, 31 M.J. at 35.

[146] *See generally* TJAGSA Practice Note, *supra* note 118, at 67-68.

[147] UCMJ art. 125.

[148] *Id.* Aggravated forms of sodomy occur when the accused's partner is under 16 years of age or the act is done by force and without the consent of the partner. MCM, 1984, Part IV, paras. 51b(2), (3). *See generally* United States v. Edens, 29 M.J. 755 (C.M.A. 1989).

[149] UCMJ art. 125.

[150] MCM, 1984, Part IV, para. 51c.

Military decisional law long has reiterated that penetration, however slight, is a necessary element of sodomy in every form, including cunnilingus.[151]

In *United States v. Milliren*[152] the accused was convicted of, *inter alia*, sodomy with a child under sixteen years of age. During the providence inquiry, the military judge advised the accused incorrectly that "any contact, no matter how slight, of the female genital area, in this case, by your mouth and tongue" is sufficient for the offense; and that "penetration of the vagina, however slight," was not required.[153] During the inquiry, the accused admitted that he "did touch the genital area of [the victim] with [his] mouth and tongue,"[154] but never indicated whether this contact involved penetration. The stipulation of fact, entered into in conjunction with the guilty plea, indicated only that the accused "began licking [the victim's] vagina and genital area with his tongue and mouth."[155]

The court in *Milliren* found that the providence inquiry and the stipulation of fact were insufficient to establish penetration as required for sodomy. The court concluded that the record was at best ambiguous as to whether this element had been satisfied.[156] The accused's conviction for sodomy was, therefore, reversed.[157]

As *Milliren* demonstrates, trial counsel must ensure that the penetration element for sodomy is established explicitly in all cases.[158] Although a sodomy specification that does not allege penetration expressly may be found to be adequate,[159] proof of penetration nonetheless is required for a conviction of this offense. Major Milhizer.

The Pitfalls of *Ex Parte* Communication—Alive and Potentially Devastating

In *United States v. Copening*[160] the Army Court of Military Review found that an improper *ex parte* conversation between the trial counsel and military judge occurred during a continuance in the court-martial proceedings. Because of the professional responsibility implications, the *Copening* opinion should be required reading for all military judges and counsel.

The facts in *Copening* indicate that the victim of a larceny suspected the accused of the theft of a gold chain.[161] Acting on the victim's suspicions, the victim's commander directed that the accused, who was at Rhein Main Air Base en route to the continental United States to be discharged, be located so that he could be searched. The air base personnel located the accused and referred him to the customs inspector—a military policeman—who obtained the accused's consent to search his person. The search revealed the gold necklace in the accused's pocket.

At a pretrial session, the defense counsel moved to suppress the admission of the necklace on the basis that no probable cause existed for the search. During litigation of the suppression motion, the inexperienced trial counsel made no attempt to show that the search was consensual. The military judge granted the motion, but told the

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[151] United States v. Cox, 18 M.J. 72 (C.M.A. 1984); *see also* United States v. Williams, 25 M.J. 854 (A.F.C.M.R.), *pet. denied*, 27 M.J. 166 (C.M.A. 1988); United States v. Breuer, 14 M.J. 723 (A.F.C.M.R. 1982), *cited in* United States v. Milliren, 31 M.J. 664 (A.F.C.M.R. 1990).

[152] 31 M.J. 664 (A.F.C.M.R. 1990).

[153] *Id.* at 665. The military judge "corrected" his earlier advisement to the accused that "penetration of the vagina, however slight, is required to establish the offense." *Id.* at 664-65. Of course, this initial advisement was a correct statement of the law.

[154] *Id.* at 665.

[155] *Id.* at 666.

[156] The court in *Milliren* acknowledged that, in other circumstances, the appellate courts have found that the penetration requirement was satisfied based on "circumstantial and interpretative" evidence. *E.g.*, United States v. Harris, 8 M.J. 52 (C.M.A. 1979) (accused's admission in a letter that he performed "cunnilingus," in conjunction with his testimony that his mouth may have touched the victim's sexual organ, was sufficient to infer penetration); United States v. Tu, 30 M.J. 587 (A.C.M.R. 1990) (accused's admission that he performed "oral sex" upon the victim, in conjunction with statement that he kissed and licked the victim's vagina, was sufficient to infer penetration); United States v. Williams, 25 M.J. 854 (A.F.C.M.R. 1988) (accused's admission that he licked the victim's clitoris was sufficient to infer penetration).

[157] The court, upon these same facts, affirmed the accused conviction of the lesser included offense of indecent acts with a child under 16 years of age in violation of UCMJ article 134. *Milliren*, 31 M.J. at 666 (citing United States v. Yates, 24 M.J. 114, 117, 120 (Everett, C.J., concurring in part and dissenting in part)); *see* MCM, 1984, Part IV, para. 87.

[158] *See Breuer*, 14 M.J. at 726 n.4.

[159] *See Cox*, 18 M.J. at 73 (sodomy specification alleging that the accused "licked the genitalia" of the victim was found to be sufficient, despite the accused's appellate claim that the language used in the specification refuted penetration).

[160] CM 8702406 (A.C.M.R. 13 Dec. 1990) (en banc reconsideration).

[161] *Id.*, slip op. at 1 (specific facts surrounding finding of gold chain came from earlier unpublished opinion, United States v. Copening, CM 8702406 (A.C.M.R. 23 June 1989)).

accused on the record, "It pains me to do this. I find nothing more despicable than a barracks thief."[162] Thereafter, the military judge granted a continuance pending a decision whether the government would appeal his ruling. Following the pretrial session, the military judge and trial counsel held an *ex parte* conversation in which they discussed "presentation of evidence and motion practice."[163] On the next day, the trial counsel filed a request for reconsideration of the motion. Realizing his impropriety, the military judge recused himself from further participation in the case. A subsequent military judge, however, granted the request for reconsideration and heard *de novo* the defense motion to suppress. The second judge denied the motion after the trial counsel presented evidence that the accused had consented to the search. The admission of the necklace ultimately led to the accused's conviction.

The Army Court of Military Review held that, although the original trial judge's actions were improper, no prejudice resulted to the accused.[164] This holding directly stemmed: (1) from the results of a *DuBay*[165] hearing, which found that the trial counsel's request for reconsideration of the suppression motion was not prompted by the *ex parte* conversation between the trial counsel and the judge; and (2) from the first trial judge's recusing himself from further participation in the case.

In addition to showing the necessity for adequate pretrial preparation by trial counsel and the necessity for chiefs of military justice or other experienced trial counsel to supervise inexperienced counsel in the courtroom adequately, the facts in *Copening* reveal two concerns regarding the parties' professional responsibility obligations. First, the military judge gave the appearance of failing to maintain his impartiality. When granting the suppression motion, the judge's statement of reluctance in granting the motion because of his despise for barracks thieves created, at a minimum, an appearance that the judge had already predetermined the accused's guilt. Merely because police authorities found the necklace in the accused's possession did not indicate that the accused was the thief. Judges must remember that judgments concerning the guilt of an accused must await the presentation of all evidence. Pronouncements regarding the question of guilt or innocence should not occur at a ruling on a suppression motion. Second, the judge and the trial counsel improperly engaged in an *ex parte* conversation about the case while it was ongoing. The case merely had been continued pending a decision whether to appeal the judge's ruling. It had not been completed. During this *ex parte* conversation, the judge again departed from his impartial role by "coaching" the trial counsel and discussing "with the trial counsel other possible theories of admissibility of evidence suppressed at *that* hearing."[166] Judges and counsel must remember that the United States Army Trial Judiciary's "Bridging the Gap" program, wherein judges critique counsel on their trial performances, is a program designed to be accomplished *after* the completion of a case, not while the case is ongoing.[167]

The *Copening* case further reveals that Army lawyers and judges not only must know the applicable professional responsibility provisions, but also should understand the underlying purposes behind the provisions. The Code of Judicial Conduct and the Rules of Professional Conduct for Lawyers exist to instill public confidence in the legal profession. The slightest appearance of impropriety in the conduct of trial participants erodes the public confidence in lawyers and in the justice system. Army lawyers would do well to read the *Copening* opinion when published in the Military Justice Reporter and to avoid the pitfalls of communicating *ex parte* and making gratuitous comments. Lieutenant Colonel Holland.

A Request for Counsel Requires Counsel's Presence

In *Miranda v. Arizona*[168] the Supreme Court decided that police must provide rights warnings prior to conducting custodial interrogation. One of the Court-created warnings from *Miranda* informs the suspect "that he has a right to the presence of an attorney, either retained or appointed."[169] When a suspect in custody invokes that right to counsel, the interrogation must stop. In *Edwards v. Arizona*[170] the Supreme Court established a bright-line rule barring police from interrogating a suspect in custody after the suspect requests counsel "until counsel has been made available to him."[171] The Court extended

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[162] *Id.*

[163] *Id.*, slip op. at 2.

[164] *Id.*, slip op. at 4.

[165] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[166] *Id.* at 2 (emphasis supplied).

[167] For the problems inherent in the "Bridging the Gap" program, see footnote 1 of the *Copening* opinion.

[168] 384 U.S. 436 (1966).

[169] *Id.* at 444.

[170] 451 U.S. 477 (1981).

[171] *Id.* at 484-85.

the *Edwards* prohibition to custodial interrogation about a different offense in *Arizona v. Roberson*.[172] Recently, however, the Court ruled that mere consultation with an attorney is not sufficient to satisfy *Edwards*. Instead, when a suspect asks for an attorney, counsel actually must be present before police can initiate custodial interrogation. This note discusses that recent decision—*Minnick v. Mississippi*,[173] its clarification and extension of the *Edwards* rule, and the questions that the *Minnick* case leaves unresolved.

Facts

Minnick and a fellow prisoner escaped from a Mississippi county jail, broke into a mobile home, and murdered two persons. Minnick fled to California, where he was arrested for the murders on Friday, August 22, 1986. On Saturday, August 23, two Federal Bureau of Investigation (FBI) agents went to the San Diego jail to interview Minnick. Minnick initially refused to meet with the agents, but jailers told him he would "have to go down or else."[174] After the agents read *Miranda* warnings, Minnick said he understood them, refused to sign a rights waiver form, but agreed to answer questions. Eventually he ended the interview by promising to make a more complete statement later. He then stated, "Come back Monday when I have a lawyer."[175] An appointed attorney spoke with Minnick two or three times following the FBI interview and before Minnick again was approached by the police.

On Monday, August 25, a deputy sheriff from Mississippi interviewed Minnick at the San Diego jail. Jailers had told Minnick he "could not refuse" to be interviewed.[176] Minnick again was advised of his rights, again refused to sign a rights waiver form, and again agreed to talk about the crimes. This time, however, Minnick admitted to shooting one victim. Minnick later was tried and convicted in Mississippi of two counts of capital murder and was sentenced to death.

The trial court suppressed Minnick's statement to the FBI agents, but admitted his statement to the sheriff. The Mississippi Supreme Court agreed that admission of the statement did not violate the fifth amendment privilege against self-incrimination. The court found that the *Edwards* rule, which prohibits police-initiated custodial interrogation following a suspect's request for counsel "until counsel has been made available to him," was not violated. It reasoned that because Minnick had, by his own admission, consulted with his counsel two or three times after he told the FBI agents that he wanted an attorney, counsel had been "made available" and the *Edwards* requirement was satisfied. The United States Supreme Court granted certiorari.

Holding and Rationale

The United States Supreme Court held that Minnick's statement to the sheriff was inadmissible. The Court's analysis was straightforward: Minnick requested counsel during the FBI interview; the sheriff initiated a subsequent interrogation; Minnick was compelled to attend that interrogation; and Minnick's lawyer was not present. Accordingly, the *Edwards* requirement was violated. The key to the analysis is the Court's conclusion that Minnick's attorney had to be *present* at the second police-initiated interrogation. Minnick's consultation with his attorney was not sufficient to satisfy the Court's dictates.

Justice Kennedy, writing for the majority, explained that the Court's precedents always have required an attorney to be present during police-initiated custodial interrogation that follows a suspect's request for an attorney. *Miranda* itself stated that once an individual in custody requests counsel, interrogation "must cease until an attorney is present."[177] *Edwards* further amplified *Miranda*'s admonition by explicitly limiting custodial interrogations that follow a suspect's request for counsel to situations in which "the accused himself initiates further communication" or "where counsel has been made available to him."[178] The Court created these requirements "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[179] As this case illustrates, mere consultation with an attorney is "not always effective in instructing the suspect of his right."[180] Consultation with an attorney actually does not eliminate coercive pressures that accrue from prolonged custody or from an official's repeated requests that a suspect change his mind and waive his rights. According to the Court, only an attorney's presence during the subsequent custodial interrogation can dissipate that coercion.

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[172] 486 U.S. 675 (1988).

[173] 111 S. Ct. 486 (1990).

[174] *Id.* at 488.

[175] *Id.* Apparently this statement constituted Minnick's request for counsel.

[176] *Id.* at 489.

[177] *Miranda*, 384 U.S. at 474.

[178] *Edwards*, 451 U.S. at 484-85.

[179] *Minnick*, 111 S. Ct. at 486 (quoting Michigan v. Harvey, 110 S. Ct. 1176, 1180 (1990)).

[180] *Id.* at 491.

Justice Kennedy stressed the importance of providing the law enforcement profession with "clear and unequivocal" guidelines. "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application."[181] Because "consultation" is not a precise concept, the Mississippi Supreme Court's adoption of that concept as a means of fulfilling the *Edwards*' requirement to make counsel available detracts from *Edwards*' clarity and reduces its usefulness. Acknowledging that the hoped for clarity had eluded the author of *Edwards*, Justice Kennedy forcefully stated the Court's latest interpretation of that decision: "Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with an attorney."[182] In the context of *Edwards*, making counsel "available" means having counsel *present* at any subsequent police-initiated interrogation. Nothing less will suffice.

Implications and Recommendations

Unfortunately, the Court's latest attempt to clarify the ambiguities of the *Edwards* rule has created new uncertainties. Chief among them is the application of *Minnick* to police-initiated interrogation of a suspect who, after requesting counsel during an initial custodial interrogation, is later released from custody. In both *Edwards* and *Minnick* the suspect was in jail continuously between the initial and subsequent interrogations. Prosecutors and law enforcement officials therefore will argue that *Minnick*'s requirement that counsel be present at any police-initiated interrogation that follows a suspect's request for counsel applies only to situations in which a suspect is held in continuous custody.[183] If a suspect is released from custody, however, *Minnick* is factually distinguishable and, therefore, does may apply.[184] In addition, the paragraph following the above-quoted holding from *Minnick* can be construed as supporting this position. In that passage, Justice Kennedy wrote, "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights or from the coercive pressures that accompany custody and that *may increase as custody is prolonged.*"[185] This language indicates that the increased pressure of continuous custody was at least one factor underpinning the Supreme Court's decision. Actually, in decisions preceding *Minnick*, military courts interpreted *Edwards*' requirement that counsel be "made available" to mean that police could initiate an interrogation with a suspect who had requested counsel, but had been released from custody, as long as the suspect had a reasonable opportunity to consult with counsel while released.[186] Moreover, during its last term, the Court of Military Appeals decision in *United States v. Schake* held that a "6-day break in continuous custody dissolved appellant's *Edwards* claim" when the accused had a "real opportunity to seek legal advice" during his release.[187] The court reached this conclusion even though Schake's attorney was not present when police interrogated him six days after he requested counsel, and even though Schake never actually consulted with his attorney during his release.[188]

Defense advocates, on the other hand, will argue that *Minnick* requires the presence of counsel at any subsequent police-initiated custodial interrogations, even when the accused is not held continuously in custody.[189] Recognizing that break in custody cases can be distinguished factually from *Minnick*, the defense bar nonetheless can point to the broad language of the Court's holding and its supporting dicta to buttress its position.[190] While explaining its holding, the Supreme Court actually noted that consultation with counsel alone cannot overcome the pressures associated with the repeated attempts of law enforcement officials to persuade a suspect to change his mind and waive his rights.[191] These pressures will exist even when a suspect is not held in custody if police repeatedly are permitted to approach a suspect whose lawyer is not present. Furthermore, the Court stressed that "consultation is not always *effective* in instructing the suspect of his rights."[192] This newly announced "effectiveness test" will apply equally to the suspect who is released from custody—especially if, as in *Schake*, the suspect merely has an opportunity to consult with an attorney, but does not actually do so. Finally, the Court's deliberately chosen language apparently is clear: "We decline to remove protection from police-initiated

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[181] *Id.* at 490.

[182] *Id.* at 491.

[183] *See, e.g., No Counsel, No Questions*, Trial Counsel Assistance Program Memorandum #60, Dec. 1990, at 2.

[184] *See, e.g.*, Message, Navy JAG, Alexandria, VA,, 201842Z Dec. 90, subject: Military Justice Advisory 7-90.

[185] *Minnick*, 111 S. Ct. at 491 (emphasis added).

[186] *See, e.g.*, United States v. Schake, 30 M.J. 314 (C.M.A. 1990); United States v. Applewhite, 23 M.J. 196 (C.M.A. 1987); United States v. Goodson, 22 M.J. 947 (A.C.M.R. 1986); United States v. Whitehouse, 14 M.J. 643 (A.C.M.R. 1982). *But see* United States v. Granda, 29 M.J. 771 (A.C.M.R. 1989) (noting that *Whitehouse* decision was the "product of confusion over the meaning of *Edwards*").

[187] 30 M.J. 314, 319 (C.M.A. 1990).

[188] *Id.* at 319 n.5.

[189] *See, e.g.*, Training Memorandum 91-1, U.S. Army Trial Defense Service, subject: Right to Counsel, 8 Jan. 1991, at 3.

[190] *Minnick*, 111 S. Ct. at 491 ("[W]e now hold that when counsel is requested, interrogation must cease and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney").

[191] *Id.* at 491.

[192] *Id.* (emphasis added).

questioning based on isolated consultations with counsel who is absent when the interrogation resumes."[193]

Minnick undercuts the rationale of cases that found an exception to the *Edwards* rule when a suspect was released from custody. For example, in *Schake* the Court of Military Appeals found that the accused had a "real opportunity" to seek legal advice; therefore, the *Edwards* requirements were fulfilled.[194] This finding was based on previous military court decisions that equated the *Edwards* requirement that counsel be "made available" upon request with a rule that ensured that the suspect had "a *reasonable opportunity* to consult with counsel."[195] Although that was a reasonable interpretation of the ambiguous language in *Edwards*, it cannot withstand scrutiny following *Minnick*. The Supreme Court purported to remove all ambiguity from its "made available" language in *Edwards* when it held that "officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with counsel."[196] If actual consultation with counsel does not satisfy *Edwards*, a mere "reasonable opportunity" to consult an attorney clearly is deficient.

Likewise, *Schake's* finding that a six-day break in custody dissolved any *Edwards* claim also was based on case law that employed what is now a questionable rationale. In *Dunkins v. Thigpen*,[197] upon which the Court of Military Appeals relied in *Schake*, the Court of Appeals for the Eleventh Circuit stated, "If the police release the defendant *and if the defendant has a reasonable opportunity to contact his attorney*, then we see no reason why *Edwards* should bar the admission of any subsequent statements."[198] Again, that court focused not only on releasing the suspect from custody, but also on giving the accused a reasonable opportunity to consult with his attorney.[199] Consultation with an attorney, however, is simply insufficient to satisfy the requirements of *Minnick*; rather, an attorney must be *present* at the subsequent police-initiated interrogation.

Minnick was interrogated on two different occasions about the same offense; therefore, the Supreme Court's holding is limited factually to that situation. Previously, however, in *Arizona v. Roberson* the Supreme Court had extended the *Edwards* rule to questioning about a different offense. In *Roberson* the suspect was arrested and police planned to question him about a just-completed burglary. He requested an attorney and the interview ended. The suspect was placed in jail where he remained for three days before different police officers, unaware of his previous request for counsel, questioned him about an unrelated offense. This time Roberson waived his rights and gave a statement. The Supreme Court ruled that no exception to *Edwards* existed for post-request, police-initiated interrogation about a different offense. Roberson's statement was inadmissible because he did not initiate the conversation and counsel was not "made available" to him.

As did Minnick and Edwards, Roberson remained in continuous custody between the time of his request for counsel and the subsequent police-initiated interrogation. Following the decision in *Minnick*, police apparently could question a suspect in Roberson's position only if an attorney were present. Because of the facts presented, however, the *Roberson* decision does not address the procedures police should follow if they want to question a suspect who has requested counsel about an unrelated offense, but later was released from police custody.

As with the *Minnick* decision, both trial and defense counsel will want either to limit *Roberson* to situations of continuous custody or to expand it to cover any questioning that follows a suspect's request for counsel. If defense advocates are correct, police could be barred forever from questioning a suspect who requests counsel during custodial interrogation unless an attorney is present. Thus a military suspect who requests counsel when stationed in Germany would be protected from police-initiated interrogation about a separate crime following his transfer to the United States unless an attorney were present. The problems this requirement would create for law enforcement are obvious. Thus far, Court of Military Appeals decisions have applied *Roberson* only to situations in which the suspect remained in continuous custody.[200] The issue, however, remains unresolved for military practitioners.

What is certain after *Minnick*? First, police may question a suspect who has remained in continuous custody

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[193] *Id.*

[194] *See Schake*, 30 M.J. at 319.

[195] *Whitehouse*, 14 M.J. at 643 (emphasis added); *see also* cases cited *supra* note 186.

[196] *Minnick*, 111 S. Ct. at 491.

[197] 854 F.2d 394 (11th Cir. 1988).

[198] *Id.* at 397 (emphasis added).

[199] The Court of Military Appeals also relied on People v. Trujillo, 773 P.2d 1086 (Colo. 1989). In *Trujillo* the court found a break in custody sufficient to dissolve *Edwards* protections. Although the court did not discuss whether the accused must have a reasonable opportunity to consult with counsel during his release, it relied on Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988), which did impose this requirement.

[200] United States v. Fassler, 29 M.J. 193 (C.M.A. 1989) (accused held in pretrial confinement); United States v. Brabant, 29 M.J. 259 (C.M.A. 1989) (accused required to wait for five hours at police station following request for counsel before commander could speak to him).

following a request for an attorney about the same or a different offense only if an attorney is present. Allowing the suspect to consult with counsel, or reading additional warnings and obtaining a waiver of rights from the suspect, will not satisfy the mandates of *Edwards*, *Roberson*, and *Minnick*. Second, police constitutionally are not required to provide a suspect in custody with an attorney, but they may not question the suspect unless an attorney is present.[201] The Supreme Court reiterated this in *Roberson*, and *Minnick* did nothing to change it. Finally, a suspect remains free to initiate discussions with authorities and waive his fifth amendment protections even after counsel has been requested. *Minnick* expressly states that this exception to the *Edwards* rule remains in effect.[202]

Conclusion

Both the prosecution and defense arguments over the effect of the *Minnick* case have merit.[203] The courts will have the task of determining whether *Minnick* applies only to custodial questioning of a suspect who remains in continuous custody or whether it applies to any police-initiated custodial questioning that follows a request for counsel. The Supreme Court already has vacated the judgment in one military case and has remanded it to the Court of Military Appeals for further consideration in light of *Minnick v. Mississippi*.[204] Until clear precedent precludes it, effective defense counsel should move to suppress any statement given after a client requested an attorney if an attorney was not present. This applies to statements given in response to police-initiated questioning about the initial offense or about an unrelated offense—whether the client remained in continuous custody or was released from custody.

Likewise, until those first court decisions are issued, the cautious prosecutor should give the broadest application to *Minnick*.[205] Police should take steps to determine whether the suspect previously had requested the assistance of counsel. If so, police should not proceed with custodial interrogation until the suspect's attorney is present. This requirement means that many suspects who otherwise would have given statements will not submit to interrogation. The alternative, however, is to risk the suppression of an important confession or the reversal of a conviction that was based on a warned statement given in the absence of counsel.

The *Minnick* decision purported to state the *Edwards* rule unambiguously. Like all bright-line rules, however, a penumbra of law in the area of a suspect's fifth amendment right to counsel remains to be illuminated by future decisions. Major Gerstenlauer.

"Part of a Unit" Urinalysis Testing: Court of Military Appeals Offers Important Guidance in *United States v. Daskam*

Under Military Rule of Evidence 313(b), an inspection is defined as "an examination of the whole or *a part of a unit* ... conducted as an incident of command the primary purpose of which is to determine and ensure the security, military fitness, or good order and discipline of the unit."[206] An important issue arising from this definition is determining what constitutes "a part of a unit." Military Rule of Evidence 313(b), however, offers no example or definition of this term. The drafters' analysis to the rule remarks that although inspections "do not normally single out specific individuals or small groups of individuals, ... [t]here is ... no requirement that the entirety of a unit or organization be inspected."[207] The drafters' analysis, however, does not cite any authority for this proposition.

In conducting urinalysis testing, practice in the field has been to test subunits. Examples of subunits may be all soldiers newly assigned to a unit or reporting into a school; all soldiers with the same last digit in their social security numbers; or all soldiers in a particular staff section or platoon. This practice is well settled, but little case law exists in support of it.[208] The Court of Military Appeals, however, in *United States v. Daskam*,[209] offered

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[201] *Roberson*, 486 U.S. at 686 n.6 (quoting *Miranda*, 384 U.S. at 474):

> We reiterate here ... that the "right" to counsel to protect the Fifth Amendment is not absolute; that is "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time."

Judge advocates are reminded, however, that Army Regulation 27-10, Legal Services: Military Justice, para. 5-13*b* (22 Dec. 1989), requires the staff judge advocate to request or appoint counsel for a soldier within 72 hours of a soldier's entering pretrial confinement, even if authorities do not plan to question the soldier.

[202] *Minnick*, 111 S. Ct. at 492.

[203] Before the *Minnick* decision was issued, the Court of Military Appeals already expressed doubts about the requirements of *Edwards*. After tracing the Supreme Court's decisions in the area, Judge Cox wrote, "Even today, we are not precisely clear as to whether counsel secured under the Fifth Amendment must invariably be present at any reinitiation of contact or whether, once substantial legal services have been provided, there are any exceptions to the presence requirement." United States v. King, 30 M.J. 59, 68 (C.M.A. 1990).

[204] United States v. Jordan, 29 M.J. 177 (C.M.A. 1989), *vacated*, 111 S. Ct. 575 (1990) ("The judgment is vacated and the case is remanded to the United States Court of Military Appeals for further consideration in light of Minnick v. Mississippi").

[205] *See* Message, HQ, Dep't of Army, DAJA-CL, 070329Z Dec. 90, subject: *Minnick v. Mississippi*.

[206] Mil. R. Evid. 313(b) (emphasis added).

[207] *Id.*, analysis, app. 22, at 20-24.

[208] *E.g.*, Murray v. Haldeman, 16 M.J. 77 (C.M.A. 1983). In *Murray* the Court of Military Appeals affirmed the conviction of a sailor for marijuana use that was evidenced by a positive urinalysis. The evidence was obtained under a command policy requiring compulsory urine testing for "all sailors reporting to [United States Navy] school." *Murray* did not discuss the selection criteria for testing a part of an unit.

[209] 31 M.J. 77 (C.M.A. 1990).

some important guidance for the practitioner on advising a commander how to identify and select subunits of his command for compulsory urinalysis testing.

In *Daskam* the accused, a career sailor in the pay grade of E-7, was convicted of two specifications of absence without authority (AWOL) and two specifications of wrongful use of amphetamines and marijuana. The four offenses were related in that the evidence of the offenses was obtained pursuant to a Chief of Naval Operations Instruction (OPNAVINST) implemented in a subordinate instruction issued by the Fleet Training Center, San Diego (FLETRACENSDINST). These two regulations authorize naval commanders to "order urinalysis inspections just as they may order any other inspection."[210] Commanders may select sailors to be tested randomly in two ways: (1) by testing an entire unit or a segment of that unit such as a work center, barracks, department, or division; or (2) by selecting "an entire subunit or identifiable segment of a command. Examples of such groups would include: ... *all personnel who surrender or are apprehended after an unauthorized absence.*"[211] Because Daskam twice had been AWOL—once for two hours and a second time for ninety-five minutes—he was compelled to provide a urine sample under the OPNAVINST and FLETRACENSDINST directives. Daskam's urine samples were "positive" for drug use and became the basis for his drug convictions. He also was found guilty of the two specifications of AWOL.

On appeal, Daskam challenged the legitimacy of the inspections. He argued that the selection of a returning AWOL service member for testing is based on a reasonable suspicion that he is using illegal drugs, "because drug use in the Armed Services often has led to chronic absenteeism."[212] Daskam asserted that using this basis for selection constituted a misuse of a commander's power to inspect, was not a valid health-and-welfare inspection, and violated Military Rule of Evidence 313(b). The Court of Military Appeals, however, refused to address the "broader question"[213] of whether Military Rule of Evidence 313(b) allows unauthorized absentees to be selected for compulsory urinalysis as "a part of a unit." Chief Judge Everett, writing the opinion for the court, sidestepped this issue by deciding the case on a much narrower ground. The Court determined that, even assuming *arguendo* that Military Rule of Evidence 313(b) permitted random urine inspection of returning AWOL service members as a "part of a unit" inspection, Daskam did not fall into that category because the inspection never was intended to apply to him. The court reasoned that the urinalysis testing of unauthorized absentees is logical only when these individuals "are truly beyond military control."[214] Daskam's absences of a few hours, however, were more of the nature of failing to go to his appointed place of duty or to going from that duty without authority than of absenting himself from military control. In other words, Daskam actually was not absent "in any meaningful sense." Therefore, he did not fall into the category of those who have "surrendered or been apprehended."[215] Accordingly, his urine samples were obtained improperly, and could not be used as evidence.

In reversing Daskam's drug conviction, the court insisted that it was not deciding the broader issue of whether returning AWOL service members legitimately may be inspected as "a part of a unit" under Military Rule of Evidence 313(b). The Court of Military Appeals, however, stated that "[t]here is considerable logic in the proposition that compulsory urinalysis is a 'health-and-welfare inspection' to determine the fitness for duty of unauthorized absentees who return to military control."[216]

Because the Court of Military Appeals does not believe that *every* unauthorized absence takes a soldier beyond military control, an issue arises over how many hours or days a soldier must be AWOL before he can be said to be meaningfully beyond military control. That AWOL is not a "continuing"[217] offense under UCMJ article 86 is well settled. The court in *Daskam*, however, treated AWOL as if it were a continuing crime in concluding that the accused's short unauthorized absences did not fall within the OPNAVINST and FLETRACENSDINST definition of AWOL for urinalysis testing purposes. Accordingly, in advising a commander on testing AWOL returnees under a "part of a unit" inspection rationale, looking at AWOL as a "continuing" offense is helpful. Significantly, the punishments under the Manual for Courts-Martial are enhanced depending on the length of the AWOL.[218] Furthermore, Army personnel administrative regulations treat

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[210] *Id.* at 80.

[211] *Id.* (emphasis in original).

[212] *Id.* at 82.

[213] *Id.* at 81 n.3.

[214] *Id.* at 82.

[215] *Id.*

[216] *Id.*

[217] "Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant an accused absents himself or herself without authority. Duration of the absence is a matter in aggravation." MCM, 1984, Part IV, para. 10c(8).

[218] AWOLs of not more than three days permit a maximum confinement of one month; AWOLs of more than three days allow confinement for up to six months; AWOLs exceeding 30 days permit the imposition of a dishonorable discharge and confinement for one year. MCM, 1984, Part IV, paras. 10e(2)(a)-(c).

AWOL as a "continuing" status. For instance, no SIDPERS entries are made for the first twenty-four hours of an AWOL; entries on DA Form 4187 are required for unauthorized absences after twenty-four hours when the soldier's status changes from present for duty (PDY) to AWOL; and an AWOL soldier is dropped from the rolls (DFR) after thirty days and thereafter is in a desertion status.[219]

If *Murray v. Haldeman*[220] permits random urinalysis testing of personnel reporting to a unit who have been beyond that unit's control prior to their arrival, a commander legitimately should be able to test all personnel who return to duty from an AWOL of more than thirty days. Compulsory urinalysis testing for unauthorized absences exceeding one week also seems legitimate. *Daskam* effectively holds only that an AWOL of less than two hours alone will *not* permit compulsory urinalysis testing under an inspection rationale. A fair reading of *Daskam* also indicates that absent unusual facts, a soldier who is AWOL for less than twenty-four hours likely will not be viewed by the Court of Military Appeals as being "truly beyond military control" and that a command policy requiring the urine testing of unauthorized absentees gone less than twenty-four hours would not be lawful under Military Rule of Evidence 313(b). What about AWOLs exceeding twenty-four hours? How lengthy does the absence have to be? No "bright-line" rule exists. An AWOL exceeding twenty-four hours clearly seems to take a soldier beyond military control—especially because an absence longer than one day results in loss of pay and in "lost time" that extends a soldier's enlistment.[221]

Trial counsel must ensure that a commander who wants to select a subunit for urinalysis testing—whether returning AWOL service members or some other category—*articulates* the criteria for selecting the group. In light of *Daskam*, the OPNAVINST and FLETRACENSDINST could have defined AWOL personnel better as "all who return from an unauthorized absence," omitting the words "surrender or are apprehended." This definition might have avoided the narrow issue highlighted by the court in ruling in Daskam's favor. Trial counsel advising commanders on drafting regulations for the compulsory urinalysis testing of returning AWOL service members must use language that avoids similar problems in defining what an AWOL is. The same reasoning applies to selecting other subunits for urine testing.

Daskam points out one other potential pitfall for trial counsel advising a commander on how properly to identify and select subunits of a command for urinalysis testing. After a subunit is selected, testing must "be conducted pursuant to preestablished guidelines rather than at the discretion of a commander."[222] In *Daskam* Navy directives required the testing of *all* who returned or surrendered from an unauthorized absence, but only *some* personnel actually were tested. The Court of Military Appeals strongly inferred that a urinalysis testing policy that is "applied willy-nilly" is unconstitutional.[223]

United States v. Bickel[224] may provide the constitutional foundation for compulsory urine testing in military society, but *Daskam* demonstrates that the application of Military Rule of Evidence 313(b) to this type of testing is far from resolved. Major Borch.

Evidence of Bias: Specific Instances of Conduct Permitted

After a witness has testified, that witness may be shown to have a bad character for truthfulness through reputation and opinion testimony.[225] Counsel may ask about specific instances of conduct that reflect on the credibility of the witness, but counsel generally may not offer extrinsic evidence of specific instances in the impeachment effort.[226] One exception to the general prohibition on evidence of specific instances, however, involves evidence of a motive to misrepresent.

The weight to be given testimony depends to a large degree upon the credibility of the witness giving the testimony. Therefore, evidence of partiality, bias, prejudice, coercion, corruption, and any other matters tending to color a witness's testimony may be presented for consideration by the factfinder. This is true even if the motive to misrepresent is shown through evidence of specific instances of misconduct.[227] Consequently, extrinsic evidence of a specific act of misconduct, which could not be used to attack a witness's credibility directly, may be used to demonstrate partiality and a motive to misrepresent.

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[219] AWOL is defined for administrative purposes as an unauthorized absence exceeding 24 hours. *See* Army Reg. 630-10, Absence Without Leave and Desertion, para. 2-2*a* (1 Oct. 1990). An AWOL soldier administratively is placed in a deserter status after 30 consecutive days of AWOL. *Id.* para. 3-2*a*(1). These regulatory definitions are not consistent with criminal law, because a soldier can be convicted of AWOL for an unauthorized absence of less than 24 hours, and for desertion incident to an AWOL of less than 30 days.

[220] 16 M.J. 77 (C.M.A. 1983).

[221] A recent Navy Judge Advocate General electronic message on *Daskam* suggested this analysis for determining whether an AWOL soldier is "meaningfully beyond military control." *See* Message, Navy JAG, Alexandria, VA, 101515Z Dec. 90, subject: Military Justice Advisory 4-90.

[222] *Daskam*, 31 M.J. at 82.

[223] *Id.* at 82 n.4 (citing Florida v. Wells, 110 S. Ct. 1632 (1990); South Dakota v. Opperman, 428 U.S. 364 (1976)).

[224] 30 M.J. 277 (C.M.A. 1990).

[225] Mil. R. Evid. 608(a).

[226] Mil. R. Evid. 608(b). Exceptions do exist; for example, Mil. R. Evid. 609 permits impeachment by showing some previous convictions of the witness.

[227] Mil. R. Evid. 608(c).

A good example of admitting specific instances to show a motive to misrepresent may be seen in *United States v. Bahr*.[228] In *Bahr* defense counsel attempted to show that the victim fabricated a story of indecent assault as a means of getting out of her parent's home and away from the mother she hated. On cross-examination, the victim denied hating her mother and denied harboring a desire to leave the home for that reason. The military judge then refused to admit into evidence the victim's diary entries detailing her hatred and desire to leave. On appeal, however, the Air Force Court of Military Review noted that the diary entries evidenced a motive to misrepresent. Accordingly, the court held that extrinsic evidence of this motive should have been admitted as a proper means of impeachment.

Counsel must be alert to the extremely wide variety of circumstances that could influence testimony by a particular witness. When a lack of impartiality can be inferred from the actions of the witness, the rules of evidence permit extrinsic evidence of these specific instances of conduct. Major Warner.

Judicial Notice of a Violated Custom or Tradition

"[T]he military has ... by necessity, developed ... traditions"[229] or customs "which by common usage have attained the force of law in the military."[230] Accordingly, the government may prosecute military members for violations of military customs.

Violations of many customs have been proscribed by statute or punitive regulation. These violations typically are charged under the particular statute or UCMJ article 92.[231] When a regulation, however, fails to define the custom with clarity, or when no regulation or statute has made violation of a particular custom illegal, how can the government prove that the custom and its proscriptions exist?[232] May the trial judge take judicial notice of the custom and, therefore, obviate the need for further proof of the custom?

In *United States v. Wales*[233] the government proved the existence of a custom against fraternization by obtaining judicial notice of paragraph 7(a), Air Force Regulation 30-1, a nonpunitive regulation, which states in part:

> In all supervisory situations, there must be a true professional relationship supportive of the mission and operational effectiveness of the Air Force. There is a long-standing and well-recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States.[234]

The Court of Military Appeals noted several problems with the prosecutor's approach of having the trial judge take judicial notice. If the particular custom had been adopted by statute or punitive regulation, and the government had prosecuted under that statute or UCMJ article 92, then Military Rule of Evidence 201A(a)[235] would have permitted judicial notice of the statute or punitive regulation. Air Force Regulation 30-1, however, contains only a general factual statement without specific punitive effect. The statement, therefore, would be offered to establish the factual truth of the matter asserted therein and would amount to hearsay for which no exemption or exception exists. Consequently, the concern with judicially-noticed facts, as with all hearsay, is that the opponent is deprived of the ability to cross-examine the witness on the matter asserted.[236]

Perhaps the most significant problem with taking judicial notice of a custom is determining exactly what is included in the custom. For example, in *Wales* the second sentence of the judicially-noticed passage from Air Force Regulation 30-1 indicates a custom against *all* officer association with enlisted personnel. The preceding sentence, however, suggests that this custom applies only to supervisory situations. Without witness testimony and cross-examination on the custom and the extent of its proscriptions, the factfinder may be deprived of knowing exactly what is, and what is not, included in the custom. Consequently, the Court of Military Appeals concluded that customs not incorporated into statutes or punitive regulations must be proven by testimony from knowledgeable witnesses subject to cross-examination and may not be proven by judicial notice.

In *United States v. Appel*[237] the Court of Military Appeals continued to explain its views on judicial notice of customs. Because a custom is not itself a statute or punitive regulation, judicial notice is appropriate only if the custom noticed is "not subject to reasonable dispute

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[228] 31 M.J. 807 (A.F.C.M.R. 1990).

[229] Parker v. Levy, 417 U.S. 733, 743 (1974).

[230] MCM, 1984, Part IV, para. 60c(2)(b).

[231] UCMJ art. 92.

[232] Without relying on a statute or punitive regulation, the government charged the accused in *Wales* under UCMJ article 134.

[233] 31 M.J. 301 (C.M.A. 1990).

[234] Air Force Reg. 30-1, Personnel: Air Force Standards (4 May 1983).

[235] Mil. R. Evid. 201A(a) states, "Domestic law. The military judge may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. R. Evid. 201—except Mil. R. Evid. 201(g)—apply."

[236] *Wales*, 31 M.J. at 309.

[237] 31 M.J. 314 (C.M.A. 1990).

in that it is either (1) generally known ... or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[238] Citing the dispute over whether the Air Force custom forbids officer fraternization with an enlisted person when no supervisory situation is present,[239] the court noted that the fraternization custom is not certain enough for judicial notice. This uncertainty over the extent of the custom is magnified by the recent dramatic increase in the number of women in the military and the likelihood of resulting effects on military customs.[240]

Noting Judge Cox's partial dissent in *Wales* is important.[241] Judge Cox saw no need to involve himself in the dispute over whether the fraternization amounted to a violation of a military custom. When the government charged the accused under UCMJ article 134, he noted that the crucial question was whether the actions of the accused were prejudicial to good order and discipline in the armed forces. If the charge had been under UCMJ article 133, the question would have been whether the conduct was unbecoming an officer and a gentleman. Judge Cox pointed out that those questions can be answered by a military court based on evidence of the conduct and its effect without resort to a punitive regulation or witnesses testifying as to a military custom.

Judge Cox asserted that customs and traditions, by their very nature and definition, are known to all members of a relevant group. Consequently, he concluded that successful prosecutions of military custom and tradition violations should not turn on either a codification of the custom or on a witness who informs the factfinder of a custom presumed to be known by all members of the armed forces.

In *United States v. Arthen*[242] the government charged an officer's fraternization with an enlisted person as a UCMJ article 133 offense. Although Major Arthen pleaded guilty to the charge, on appeal she and the Air Force Court of Military Review questioned whether the specification actually alleged conduct unbecoming an officer[243] and fraternization. Appellate government counsel followed the lead of Judge Cox by pointing out that Major Arthen had not been charged with fraternization. The government argued that it was required under UCMJ article 133[244] only to prove that Major Arthen's conduct was unbecoming an officer and gentlewoman, which she admitted during the providence inquiry.

The Air Force court disagreed. When the government charged conduct that otherwise constituted a specific offense set forth in the Manual for Courts-Martial, it was required to prove the same elements set forth for the specific crime *in addition to* proving that the conduct was unbecoming an officer and gentleman.[245] The court found that the government, for all intents and purposes, had charged Major Arthen with fraternization. In addition, the court noted that an element of proof for the UCMJ article 134 offense of fraternization is that the "fraternization violated the custom of the accused's service."[246]

According to *Arthen*, the government apparently is obliged to prove that a custom exists even if the conduct is charged under UCMJ article 133. The prohibition on judicial notice, which covers situations in which the custom is not adopted by a punitive regulation or statute, remains.[247]

After these most recent cases, prudent trial counsel should avoid creating an appellate issue by not relying on judicial notice to establish the existence of a custom or tradition. Judge Cox is correct that military customs and traditions, by their very nature, are known by all military members. Trial counsel normally should have no problem in finding military members who can testify on military customs and traditions, on the prejudicial effects of violating a particular custom, and on how an officer's violation of a particular custom is unbecoming one's position as an officer and gentleman.

Even if a future Court of Military Appeals were to change its mind and allow judicial notice of a custom, the astute trial counsel will remember that court members "may, but are not required to, accept as conclusive any matter judicially noticed."[248] Consequently, defense counsel should be prepared with witnesses to expose the limitations, ambiguities, and changing nature of military customs and traditions at issue. Further, all counsel should remember that judicial notice of a fact does not preclude the opposing party from arguing that the court members should reject the noticed fact. Major Warner.

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[238] Mil. R. Evid. 201(b).

[239] *Appel*, 31 M.J. at 320 (citing United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985)).

[240] *Id.* at 320.

[241] *Wales*, 31 M.J. at 311-13.

[242] CM 28590 (A.F.C.M.R. 21 Dec. 1990).

[243] The specification alleged that Major Arthen treated an airman on terms of military equality by maintaining a romantic relationship with him; sleeping with him; hugging, kissing, and holding hands with him; and discussing her romantic thoughts towards him in the presence of others.

[244] MCM, 1984, Part IV, para. 59b.

[245] *Id.*, Part IV, para. 59c(2).

[246] *Id.*, Part IV, para. 83b(4).

[247] Citing *Appel*, 31 M.J. at 317, the Air Force court noted that a violation of the Air Force fraternization custom does require some "duty relationship which regularly or recurringly calls for or may call for direction, oversight, correction or evaluation of the enlisted member by the officer." The court found Major Arthen's guilty plea to the UCMJ article 133 offense to be improvident because her stipulation and statements during the providence inquiry failed to admit that such a duty relationship existed.

[248] Mil. R. Evid. 201(g).

Fragmenting One AWOL into Many

In *United States v. Fritz*[249] the accused pleaded guilty as charged to an AWOL[250] from 4 December 1987, to 6 July 1989.[251] During the providence inquiry, the accused related that on 10 January 1988, he had been jailed at a distant location by civilian authorities for driving under the influence of alcohol. On that same date, the accused telephoned a chief petty officer at his installation and told him about his situation. The chief petty officer, however, indicated that he would neither try to obtain custody of the accused nor undertake any action to secure the accused's release. On 25 January 1988, the accused was released from civilian confinement. Fritz, however, never attempted to surrender to military authorities and remained AWOL until 6 July 1989. The military judge, after accepting the accused's guilty pleas, found him guilty by exceptions and substitutions of two included periods of AWOL—one from 4 December 1987, to 10 January 1988, and another from 25 January 1988, to 6 July 1989.[252]

The court of review in *Fritz* initially observed that the military judge erred in concluding that the accused's responses did not support an AWOL conviction for the entire twenty-month period as alleged.[253] The decisional authority is clear that a service member's AWOL status is not terminated per se by his detention by civilian authorities.[254] For example, an AWOL will not be terminated if the service member is confined by civilian authorities for civilian charges while he is AWOL, even if no civilian conviction results.[255] On the other hand, when civilian authorities apprehend an AWOL service member and detain him at the request of the military, the AWOL is thereby terminated.[256] Likewise, if an AWOL service member who is confined by civilian authorities for civilian charges is detained in confinement pursuant to a request by military authorities, the AWOL ends at the point that the service member would have otherwise been released by the civilians.[257] The question of when the AWOL terminates turns, in short, upon whether the AWOL service member is being confined for a military or for a civilian purpose.[258] Because the facts in *Fritz* do not suggest that the accused's confinement in a civilian jail was at the request or behest of military authorities, the confinement did not terminate the accused's AWOL status.

The court in *Fritz* next acknowledged that, notwithstanding the military judge's error, the accused conceivably could be found guilty of multiple included AWOLs under a single AWOL specification.[259] The court wrote:

> However, it must be shown that, for each separate finding of guilty, there was, in fact, a corresponding separate and distinct absence without leave, *United States v. Bush*, 18 M.J. 685 (N.M.C.M.R.), *pet. denied*, 19 M.J. 28 (C.M.A. 1984), for even *Francis* did not presume to overrule the venerable holding of *United States v. Emerson*, 1 U.S.C.M.A. 43, 1 C.M.R. 43 (1951) that what is, in fact, a single and uninterrupted period of absence without leave may not be fragmented so as to be made the basis for conviction of more than one offense.[260]

Accordingly, the court in *Fritz* concluded that it could affirm one of the two periods of AWOL found by the military judge, but not both.

The government argued on appeal that the court should affirm the second and longer included period of

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[249] 31 M.J. 661 (N.M.C.M.R. 1990).

[250] UCMJ art. 86.

[251] *Fritz*, 31 M.J. at 662.

[252] The court of review characterized these findings as being "without warning." *Id.* In support of his findings, the military judge cited United States v. Francis, 15 M.J. 424 (C.M.A. 1983).

[253] *Fritz*, 31 M.J. at 662 (citing United States v. Asbury, 28 M.J. 595 (N.M.C.M.R. 1989)).

[254] *See generally* Anderson, *Unauthorized Absences*, The Army Lawyer, June 1989, at 3, 9-11, and cases cited therein.

[255] *See* United States v. Sprague, 25 M.J. 745 (A.C.M.R. 1987); *see also* United States v. Myhre, 25 C.M.R. 294 (C.M.A. 1958).

[256] United States v. Garner, 23 C.M.R. 42 (C.M.A. 1957); *see* United States v. Hart, 47 C.M.R. 686 (A.C.M.R. 1973).

[257] *Asbury*, 28 M.J. at 598-99; *see* United States v. Lamphear, 49 C.M.R. 472 (C.M.A. 1975); United States v. Agee, 11 M.J. 905 (A.F.C.M.R. 1981); United States v. Bowman, 49 C.M.R. 406 (A.C.M.R. 1974).

[258] Note that the accused's telephone call to the chief petty officer, standing alone, could not serve to terminate his AWOL. *See* United States v. Anderson, 1 M.J. 688 (N.C.M.R. 1975); *see also* United States v. Sandell, 9 M.J. 798 (N.M.C.M.R. 1980).

[259] *Fritz*, 31 M.J. at 662 (citing United States v. Francis, 15 M.J. 424 (C.M.A. 1983)); *see* MCM, 1984, Part IV, para. 10c(11). The court in *Fritz* recognized that *Francis* is inconsistent with the military case authority that describes AWOL as being an instantaneous, rather than a continuing, offense. *See generally* Anderson, *supra* note 254, at 8-9; A. Avins, The Law of AWOL 69 (1957); Lederer, *Absence Without Leave—The Nature of the Offense*, The Army Lawyer, Mar. 1974, at 4, 8.

[260] *Fritz*, 31 M.J. at 662.

AWOL.[261] The court responded that resort to a later inception date—25 January 1988—is permitted only if the evidence fails to establish that the AWOL commenced on the inception date alleged in the specification—4 December 1987.[262] Because the inception date charged in the specification properly was established, the court was constrained to affirm only the initial, shorter period of AWOL.[263]

Fritz illustrates some of the difficulties associated with AWOL and related offenses. Practitioners dealing with these crimes must become familiar with the many complex issues that can arise when a single AWOL is fragmented into several included offenses. Major Milhizer.

Cross-Dressing as an Offense

Article 134 of the Uniform Code of Military Justice proscribes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces...."[264] This language constitutes the first two clauses of the general article.[265]

The conduct reached by these two clauses includes all of the offenses enumerated in Part IV of the 1984 Manual for Courts-Martial,[266] as well as "novel" crimes that are not listed in the Manual. Examples of unlisted article 134 offenses include having unprotected sexual intercourse and thereby knowingly exposing one's partner to the human immunodeficiency virus (HIV),[267] setting off a false fire alarm and writing on the doors of an Air Force dormitory,[268] being a "peeping Tom" in a women's latrine,[269] and glue-sniffing aboard ship with the intent of becoming intoxicated.[270]

In its 1988 opinion in *United States v. Davis*,[271] the Court of Military Appeals addressed whether cross-dressing[272] was an offense under the first two clauses of article 134. In concluding that the accused's conduct constituted that offense, the court emphasized that it took place on a military installation. The court observed that the accused's cross-dressing occurred "on a military installation which virtually always would be prejudicial to good order and discipline and discrediting to the Armed Forces."[273] The court observed further that "[t]he essence of [the accused's] crime is that his unusual conduct, *when it occurred on a military installation*, had an adverse effect on military order and discipline and created a negative perception of the armed services."[274] The court also wrote:

> the fact that there are some conceivable situations—such as a King Neptune ceremony and Kibuki theater—where "cross-dressing" might not be prejudicial to good order and discipline is not significant. These occasions do not generally occur in or near a barracks or a [base] theater, the locations described in the specifications.[275]

Davis, therefore, did not address whether cross-dressing off a military installation would constitute an article 134 violation. Moreover, because *Davis* focused upon the adequacy of the specifications in alleging article 134 offenses, it did not address the appropriate punishment for cross-dressing.

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[261] Because the charged AWOL—as well as both included AWOLs—exceeded 30 days, the maximum punishment faced by the accused was unchanged by the court's action. *See* MCM, 1984, Part IV, para. 10e(2)(c). The court nonetheless concluded that a rehearing on sentencing was required, given the disparity of the offenses of which the accused was convicted and the single AWOL that was affirmed.

[262] *Fritz*, 31 M.J. at 662 (citing United States v. Harris, 45 C.M.R. 364 (C.M.A. 1972)); *see also* United States v. Daly, 15 M.J 739 (N.M.C.M.R. 1983) (guilty plea to AWOL with inception date of 9 September held to be provident even though accused admitted leaving on 6 September); United States v. Brock, 13 M.J. 766 (A.F.C.M.R. 1982) (guilty plea to AWOL with inception date of 14 October held to be provident even though accused admitted leaving on 13 October); United States v. Porter, 12 M.J. 949 (N.M.C.M.R. 1982) (guilty plea to AWOL with inception date encompassed by a larger period of AWOL was provident).

[263] *Fritz*, 31 M.J. at 663 (citing United States v. Lynch, 47 C.M.R. 498 (C.M.A. 1973)).

[264] UCMJ art. 134. For a discussion of article 134 generally, see TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

[265] The third clause of article 134 reaches conduct constituting a noncapital crime not punishable under another article of the UCMJ. *See generally* TJAGSA Practice Note, *supra* note 264, at 68-69.

[266] MCM, 1984, Part IV, paras. 61-113. Common examples of enumerated article 134 offenses include indecent assault, *id.*, Part IV, para. 63; dishonorably failing to pay a just debt, *id.*, Part IV, para. 71; and false swearing, *id.*, Part IV, para. 79.

[267] United States v. Woods, 28 M.J. 318 (C.M.A. 1989).

[268] United States v. Kopp, 9 M.J. 564 (A.F.C.M.R. 1980).

[269] United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978).

[270] United States v. Limardo, 39 C.M.R. 866 (N.B.R. 1969).

[271] 26 M.J. 445 (C.M.A. 1988).

[272] The term "cross-dressing," as used by the court in *Davis*, means wearing the clothing of the opposite sex.

[273] *Davis*, 26 M.J. at 449.

[274] *Id.* at 448 (emphasis added).

[275] *Id.* at 449.

Both of these issues were considered by the Navy-Marine Corps Court of Military Review in *United States v. Guerrero*.[276] The accused in *Guerrero* was convicted of two specifications of cross-dressing in public view.[277] Both incidents took place off the installation.[278] The accused's sentence included a bad-conduct discharge, but no confinement.[279]

In the first incident, a sailor accepted the accused's offer to drive him to the airport. The two had met on a Navy installation and were aware of each other's military status. After picking up their boarding passes, the sailor accompanied the accused to the latter's apartment. While there, the accused explained that he sometimes "crossed-over." The accused then went to his bedroom and returned a short time later dressed in "a long-haired wig, makeup, miniskirt, and a blouse."[280] Upon seeing this, the sailor immediately departed.[281]

The second incident involved conduct on divers occasions about two months later, all of which took place at, or in the vicinity of, the accused's off-base apartment. On one occasion the accused's neighbor—also a sailor—occupied an apartment about ten to fifteen feet away, and directly across from, the accused's.[282] The neighbor was aware of the accused's military status. On one occasion the neighbor, while looking from his apartment into the accused's bedroom, observed the accused wearing a wig, make-up, and women's clothing. He reported this incident to the apartment manager, who was a retired master chief petty officer. On another occasion that same month, the accused asked the apartment manager to let him into his apartment. At the time, the accused was dressed in "a tight skirt, wig, and makeup."[283] The apartment manager knew that the accused was in the Navy.

The court in *Guerrero* concluded that the accused's conduct violated the first two clauses of article 134, notwithstanding its taking place off base. The court did not construe *Davis* as requiring that the cross-dressing occur on base to violate article 134.[284] Rather, *Davis* was interpreted to mean that cross-dressing can violate article 134—regardless of the situs of the conduct—provided that it has "an adverse effect on military order and discipline and created a negative perception of the armed services."[285] In other words, the location of the cross-dressing is but one of many factors that determine whether the conduct is prejudicial to good order and discipline or is service discrediting.

In affirming the accused's conviction in *Guerrero*, the court relied on several facts as establishing that the accused had violated article 134. The court noted that the accused:

> was frocked as a chief petty officer in the Navy with 9½ years of service; that [his] cross-dressing was casual, open, and notorious; that he was known to be a chief petty officer in the Navy by ... the apartment manager, [his neighbor, and the other sailor] at the time those individuals observed [him] dressed as a woman; and that [the neighbor and the other sailor] were junior to [the accused].[286]

The court also examined the legality of the adjudged bad-conduct discharge. It considered that the court in *Guerrero* first noted that cross-dressing was not an enumerated article 134 offense; therefore, no specified punishment for it is found in the Manual.[287] For "novel" article 134 offenses such as cross-dressing, the maximum punishment is determined by referring to the maximum punishment permitted for the most closely related, enumerated article 134 offense.[288] The court concluded

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[276] 31 M.J. 692 (N.M.C.M.R. 1990).

[277] *Id.* at 693.

[278] *Id.* at 693 n.1.

[279] *Id.* at 694. His sentence also included a reduction to the grade of sergeant. Why the military judge would adjudge this partial reduction in conjunction with a discharge is not clear. The opinion does not reflect that the judge recommended suspension of the discharge.

[280] *Id.*

[281] *Id.* at 694-95. The accused told the sailor as he left that "I thought you had experienced it. I'll have to show you sometime." *Id.* at 695. The sailor thereafter reported the incident to his command and to law enforcement authorities. *Id.*

[282] *Id.* at 694.

[283] *Id.*

[284] *Id.* at 695 n.2.

[285] *Id.* (quoting *Davis*, 26 M.J. at 448).

[286] *Guerrero*, 31 M.J. at 695 (citing United States v. Hooper, 26 C.M.R. 417, 427 (C.M.A. 1958)). The court also concluded that the accused had adequate notice of the criminality of his conduct given his rank, his experience in the military, and the requirements of UCMJ article 137. *Id.* at 696.

[287] For article 134 offenses listed in MCM, 1984, Part IV, paras. 61-113, the specified punishments control.

[288] *E.g.*, United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1978) (state auto burglary statute was closely related to article 130 housebreaking; therefore, offense should be punished consistent with the article 130 punishments); United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (false bomb report statute was related closely to article 107 false official report offense; therefore, offense should be punished consistent with the article 107 punishments). If an unlisted offense is included in a listed crime and is related closely to another, or is related equally closely to two or more listed offenses, the lesser punishment of the two crimes will apply. If the punishment for an unlisted offense cannot be determined by applying any of these tests, then the maximum punishment is the one provided for by the civilian statute or authorized by the custom of the service. *See, e.g.*, United States v. Canatelli, 5 M.J. 838 (A.C.M.R. 1978) (prosecution under 18 U.S.C. § 842(h) for possession of stolen explosives is punished under penalties provided by federal statute); United States v. Cramer, 24 C.M.R. 31 (C.M.A. 1957) (prosecution under 4 U.S.C. § 3 for wrongfully and dishonorably defiling the American flag is punished under the penalties provided in the federal statute). *See generally* United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961); United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1982) (when state statute is assimilated, its penalty also is assimilated). The information for this footnote appears in a Criminal Law Deskbook. *See* Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law: Crimes & Defenses, JA 377, at 1-121 (Aug. 1990). Persons interested in obtaining a copy of this deskbook can order it through the Defense Technical Information Center. The procedures for ordering the deskbook are found in the Current Material of Interest section of *The Army Lawyer*.

that cross-dressing most closely resembles disorderly conduct under article 134;[289] therefore, the maximum punishment for that offense would control.[290] Consequently, because the accused was convicted of two offenses that authorize a total confinement in excess of six months, the adjudged bad-conduct discharge was a permissible punishment.[291] Major Milhizer.

Distributing Drugs to the Drug Distributor

Uniform Code of Military Justice article 112a proscribes, *inter alia*, wrongful distribution of a controlled substance. The definition of distribution, as found in the corresponding paragraph of the Manual for Courts-Martial,[292] is quite broad: "'Distribute' means to deliver to the possession of another. 'Deliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."[293]

Military courts have given this broad definition of distribution an expansive interpretation. For example, the Court of Military Appeals has held that distribution can occur even if the recipient is unaware of the presence of the drugs and the accused intended to reclaim the drugs before they went into commerce.[294] Likewise, the court has concluded that distribution can consist of passing drugs from one coconspirator to another.[295] Even the so-called *Swiderski* exception,[296] which has been acknowledged in dicta as applying in the military,[297] always has been distinguished factually to disallow its application.[298] Arguably, the term distribution has been given a broader definition by the courts than the Manual might suggest.[299]

The courts, however, have recognized that the term "distribution" has some limits. For example, wrongful distribution did not occur when drugs were transferred between government agents while the accused neither ratified the sale nor accepted the proceeds therefrom.[300]

The latest case to address the scope of distribution under article 112a is *United States v. Herring*.[301] Although the opinion does not report the facts comprehensively, it indicates that the accused's conviction for at least one distribution of cocaine[302] was based upon his "passing the cocaine back to the original supplier during the course of ingesting it ...."[303] The court in *Herring* affirmed the accused's conviction for this distribution without further discussion. This result seems consistent with the federal civilian cases, which hold that absent the *Swiderski* exception, sharing drugs constitutes distribution of drugs.[304] Likewise, the result is supported by the military decisions, which find that coconspirators can be guilty of drug distribution to each other.[305]

Determining the precedential value of *Herring* is problematic, however, because of the almost cryptic nature of its discussion and resolution of the distribution issue. *Herring* nonetheless manifests military courts' continued willingness to give wrongful distribution under article 112a a remarkably broad scope. Major Milhizer.

Drunk and Disorderly Conduct

The recent case of *United States v. Chambers*[306] illustrates how trial practitioners may overlook the special proof requirements of drunk and disorderly conduct under

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[289] Disorderly conduct is

> conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

MCM, 1984, Part IV, para. 73c(2). The court of review disagreed with the military judge, who concluded that cross-dressing most closely resembles "the wearing of unauthorized insignia, decoration, badge, ribbon, device, or lapel button ... ." *Guerrero*, 31 M.J. at 696; *see* MCM, 1984, Part IV, para. 113.

[290] The maximum punishment for service-discrediting disorderly conduct is confinement for four months and forfeiture of two-thirds pay per month for four months. MCM, 1984, Part IV, para. 73c(1)(a).

[291] R.C.M. 1003(d)(3). The military judge, however, sentenced the accused in relation to the maximum punishment for an unauthorized insignia offense, which includes a bad-conduct discharge without resort to an "escalator" provision. MCM, 1984, Part IV, para. 113e. The court in *Guerrero* found this circumstance to be nonprejudicial. *Guerrero*, 31 M.J. at 696 (citing United States v. Timmons, 13 M.J. 431, 435 (C.M.A. 1982)).

[292] MCM, 1984, Part IV, para. 37c(3).

[293] *Id.* The same broad language was used in the revised version of the previous Manual. *See* Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 213*g*; United States v. Brown, 19 M.J. 63, 64 (C.M.A. 1984).

[294] United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986).

[295] United States v. Tuero, 26 M.J. 106 (C.M.A. 1988); *see* United States v. Figueroa, 28 M.J. 580 (N.M.C.M.R. 1989).

[296] United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) (when two individuals simultaneously and jointly acquire possession of a drug for their own personal use and intend to share it together, their only crime is wrongful possession or use; they are not guilty of aiding and abetting the distribution to each other).

[297] United States v. Hill, 25 M.J. 411 (C.M.A. 1988).

[298] *E.g.*, *id.* at 413-14; United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988); United States v. Allen, 22 M.J. 512 (A.C.M.R. 1986).

[299] *E.g.*, United States v. Omick, 30 M.J. 1122 (N.C.M.R. 1989) (distribution can occur without a physical transfer of the drug). *See generally* TJAGSA Practice Note, *Does Drug Distribution Require Physical Transfer?*, The Army Lawyer, Nov. 1990, at 44.

[300] United States v. Bretz, 19 M.J. 224, 227-28 (C.M.A. 1985). *See generally* United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[301] 31 M.J. 637 (N.M.C.M.R. 1990).

[302] The opinion indicates that the accused was convicted, *inter alia*, of "several uses and distributions of cocaine ... ." *Id.* at 638.

[303] *Id.* at 639.

[304] *E.g.*, United States v. Ramirez, 608 F.2d 1261 (9th Cir. 1979); United States v. Branch, 483 F.2d 955 (9th Cir. 1973).

[305] *Tuero*, 26 M.J. at 106; *Figueroa*, 28 M.J. at 580.

[306] 31 M.J. 776 (A.C.M.R. 1990).

military law.[307] Before discussing the specific matters at issue in *Chambers*, a brief recitation of the facts and a review of the pertinent law are appropriate.

The accused in *Chambers* was charged, *inter alia*, with service-discrediting drunk and disorderly conduct.[308] He pleaded guilty to "simple" drunk and disorderly conduct, excepting the words that alleged that his conduct was service discrediting. During the providence inquiry, the military judge did not advise the accused that, to be found guilty consistent with his pleas, the accused's conduct must nonetheless be prejudicial to good order and discipline.

Public drunkenness—sometimes referred to as drunk[309] and disorderly conduct[310]—long has been recognized as an offense under military law.[311] The military's courts and boards have affirmed convictions for public drunkenness since the inception of the UCMJ.[312] Because public drunkenness almost always has been punished under the general article, it has been developed primarily by decisional authority.

The 1984 Manual for Courts-Martial includes "Disorderly conduct, drunkenness" as an enumerated article 134 offense.[313] The Manual provides that this offense has two elements of proof:

> (1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and
>
> (2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[314]

As reflected above in the second element, drunk and disorderly conduct can be grounded on either the first or second clause of article 134.[315] The first clause of article 134 reaches conduct that is prejudicial to good order and discipline in the armed forces.[316] The second clause of article 134 reaches service-discrediting conduct.[317] Misconduct charged under article 134 often is specified as a violation of both the first and the second clauses of the statute.

The President has provided for an enhanced maximum punishment for drunk and disorderly conduct when the accused's conviction is based upon the second clause of article 134.[318] Therefore, "[u]nlike most offenses under Article 134, 'conduct of a nature to bring discredit upon the armed forces' must be included in the specification and proved in order to authorize the higher maximum punishment when the offense [of drunk and disorderly conduct] is service discrediting."[319]

As noted by the court in *Chambers*, the accused's plea of guilty by exceptions to "simple" drunk and disorderly conduct did not eliminate the second element of the offense.[320] Accordingly, "the military judge should have advised the [accused] and obtained his admission that the second element of this Article 134, UCMJ, offense was conduct prejudicial to good order and discipline."[321] The court in *Chambers* concluded correctly that the judge's failure to do so rendered the accused's guilty plea improvident.

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[307] UCMJ art. 134.

[308] *Chambers*, 31 M.J. at 777.

[309] *See* MCM, 1984, Part IV, para. 35c(3) (discussion of intoxication).

[310] For a good discussion of disorderly conduct see United States v. Manos, 24 C.M.R. 626 (A.F.B.R. 1957); *see also* MCM, 1984, Part IV, para. 73c(1). *See generally* TJAGSA Practice Note, *Breach of the Peace Under Military Law*, The Army Lawyer, Sep. 1990, at 31 (discussing disorderly conduct in the context of breach of peace).

[311] W. Winthrop, Military Law and Precedents 292-93 (2d ed. 1920).

[312] *E.g.*, United States v. McMurtry, 1 C.M.R. 715 (A.F.B.R. 1951). For a collection of military cases dealing with alcohol related offenses under the UCMJ, see Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 132-33 n.7 (1990).

[313] MCM, 1984, Part IV, para. 73.

[314] *Id.*, Part IV, para. 73b.

[315] For a discussion of article 134 in general, and its first two clauses in particular, see TJAGSA Practice Note, *supra* note 264, at 66.

[316] As the Manual for Court-Martial indicates, not every irregular, mischievous, or improper act is a court-martial offense under the first clause. *See* MCM, 1984, Part IV, para. 60c(2)(c). Rather, the conduct must be directly and palpably prejudicial to good order and discipline to constitute a violation of the first clause of article 134. *See* United States v. Sandinsky, 34 C.M.R. 343, 345 (C.M.A. 1964) (citing United States v. Holiday, 16 C.M.R. 28 (C.M.A. 1954)).

[317] To constitute a violation of clause two, the conduct must have the tendency to bring the service into disrepute or the tendency to lower the service in public esteem. MCM, 1984, Part IV, para. 60c(3). Conduct will be service discrediting when civilians are aware of both the military status of the offender and the discrediting nature of his behavior. United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955). Conduct that is open and notorious may be service discrediting, while wholly private conduct generally is not reached by article 134. United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); *see* United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Carr, 28 M.J. 661 (A.F.C.M.R. 1989).

[318] The maximum punishment for drunk and disorderly conduct is confinement for three months and forfeiture of two-thirds pay per month for three months. MCM, 1984, Part IV, para. 73e(3)(c). The maximum punishment for service-discrediting drunk and disorderly conduct is confinement for six months and forfeiture of two-thirds pay per month for six months. *Id.*, Part IV, para. 73e(3)(b). *See generally* UCMJ art. 56; United States v. Scranton, 30 M.J. 322, 326 (C.M.A. 1990) (President is permitted to provide for enhanced punishment based on aggravating factors).

[319] MCM, 1984, Part IV, para. 73c(3).

[320] *Chambers*, 31 M.J. at 778.

[321] *Id.*

These special proof requirements for drunk and disorderly conduct apply equally in contested cases. Therefore, practitioners should refer to the appropriate instruction in the Military Judges' Benchbook[322] when requesting or formulating instructions for service-discrediting drunk and disorderly conduct that raises "simple" drunk and disorderly conduct as a lesser included offense.[323] Major Milhizer.

Defining "Knowing" Use of a Controlled Substance

Three years ago, in *United States v. Mance*,[324] the Court of Military Appeals held that for an accused to be guilty of wrongfully possessing or using a controlled substance,[325] he or she must *knowingly* possess or use the controlled substance.[326] As the court explained, "for possession or use to be 'wrongful,' it is not necessary that the accused have been aware of the precise identity of the controlled substance, so long as he is aware that it is a controlled substance."[327] Therefore, if an accused believed that he or she possessed cocaine when he or she actually possessed heroin, that person could be convicted of wrongful possession of heroin because the person had the requisite knowledge to establish wrongfulness.[328]

Last year, in *United States v. Myles*,[329] the court explained further that a mistake as to the nature of the controlled substance was not exculpatory even though the accused was exposed to a greater maximum punishment because of his mistake.[330] The accused in *Myles* was convicted of wrongful use of cocaine based upon a positive urinalysis test result.[331] He unsuccessfully defended by asserting that the marijuana cigarettes, which he knowingly smoked, had been laced with cocaine without his knowledge. The court wrote that, "in our view, this variation in the maximum punishments prescribed by the President for use of controlled substances does not alter the basic principle that the identity of the controlled substance ingested is not important in determining the wrongfulness of its use."[332] Because the accused was charged with the cocaine offense only—he was not also charged with a marijuana offense—*Myles* left open the issue of whether an accused could be convicted for wrongfully using both cocaine and marijuana.

That issue, however, was addressed by the Navy-Marine Corps Court of Military Review in *United States v. Stringfellow*.[333] The accused in *Stringfellow* pleaded guilty to wrongfully using cocaine and amphetamine/methamphetamine. He said during the providence inquiry that he knowingly and voluntarily used cocaine and that he knew that this conduct was prohibited by law. He also told the military judge, however, that he did not realize that the cocaine he was snorting had been laced with amphetamine/methamphetamine.[334] He also told the military judge that he did not know that mixing these drugs was a "common practice."[335]

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[322] Dep't of Army, Pam 27-9, Military Judges' Benchbook (1 May 1982) [hereinafter Benchbook].

[323] *Id.* para. 3-140 (C3 15 Feb. 1989), provides in pertinent part:

> You will note that the Government has alleged that the conduct in question in the specification(s) of (the) charge was of a nature to bring discredit upon the armed forces. To convict the accused of the offense charged, you must be convinced beyond a reasonable doubt of all the elements, including that of the service discrediting nature of the conduct. If you are convinced of all the elements *except* the element of the service discrediting nature of the conduct, you may still convict the accused of drunk and disorderly conduct provided you are convinced beyond a reasonable doubt that the conduct was to the prejudice of good order and discipline in the armed forces.... Of course, if you are convinced beyond a reasonable doubt that the conduct in question was *both* to the prejudice of good order and discipline in the armed forces, *and* was of a nature to bring discredit upon the armed forces, then you may convict the accused as he or she is charged provided you are convinced beyond a reasonable doubt as to the other elements of the specification(s) of (the) Charge.

(emphasis in original).

[324] 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988).

[325] UCMJ art. 112a.

[326] *Mance*, 26 M.J. at 253-54.

[327] *Id.* at 254.

[328] *Id.* Leaving aside multiplicity problems, such an accused also presumably would be guilty of attempted possession of cocaine. *See generally* UCMJ art. 80. As the court correctly noted in *Mance*, if the accused actually possessed sugar, believing he possessed cocaine, the most serious crime he could be convicted of is attempted possession of cocaine. *Mance*, 26 M.J. at 254 n.2.

[329] 31 M.J. 7 (C.M.A. 1990).

[330] The maximum punishment for possession and use of cocaine and heroin—the drugs at issue in *Mance*—are identical. MCM, 1984, Part IV, para 37e(1). Accordingly, the court in *Mance* did not address expressly whether an accused's mistake as to the nature of the controlled substance possessed or used would be exculpatory when the controlled substance intended to be possessed or used by the accused was "less serious" than the substance actually involved. This was the situation presented to the Court of Military Appeals in *Myles*, in which the accused contended that he used both cocaine and marijuana, but intended to use only marijuana. Because the marijuana purportedly used by the accused totalled less than 30 grams, the maximum punishment to confinement faced by the accused for the marijuana offense he intentionally committed was substantially less than the cocaine offense of which he was convicted. The accused was not also charged with a marijuana offense. *Compare* MCM, 1984, Part IV, para. 37e(1)(b) (maximum punishment to confinement for wrongful possession or use of less than 30 grams of marijuana is two years) *with id.*, Part IV, para. 37e(1)(a) (maximum punishment to confinement for wrongful possession or use of cocaine is five years).

[331] *Myles*, 31 M.J. at 7.

[332] *Id.* at 9-10 (footnote omitted). For a recent discussion of these issues, as addressed in *Myles*, see TJAGSA Practice Note, *Mistake of Drug Is Not Exculpatory*, The Army Lawyer, Dec. 1990, at 36.

[333] 31 M.J. 697 (N.M.C.M.R. 1990). *Stringfellow* was decided the same day as *Myles*; therefore, neither case cites to the other.

[334] *Id.* at 698. He nonetheless assured the military judge that he had since become "sure" that the cocaine he ingested was laced with amphetamine/methamphetamine.

[335] *Id.*

Citing *Mance*, the Navy-Marine Corps court in *Stringfellow* held that the accused need not know the precise pharmacological identity of the drug or drugs he is using to be guilty of wrongful use under article 112a.[336] The court noted that had the facts been as the accused believed them to be—that is, that he was ingesting cocaine only—his conduct nonetheless would have been wrongful.[337] Accordingly, the court concluded that the "essential element, knowing use, is not really missing.... [because the accused] knew he used a controlled substance."[338] The accused, therefore, could be convicted of wrongfully using both cocaine and amphetamine/methamphetamine.[339]

Lastly, although the court in *Stringfellow* acknowledged that drug users may be particular about the types of controlled substances they intentionally use, it nonetheless held that

> as a matter of public policy, at least within the Navy and Marine Corps, when a sailor or Marine uses what he or she knows to be a controlled substance, he or she is legally accountable for whatever other controlled substance is present and cannot avail him or herself of the lack of that knowledge. The fact that he got more than he bargained for is a consequence he must bear for being part of the drug culture. To not hold Marines and sailors accountable for such illegal conduct would jeopardize the military community's ability to deter illegal drug abuse.[340]

Whether other courts will recognize this categorical policy is unclear.[341] Major Milhizer.

Lawfully Using Marijuana to Protect One's Cover

In *United States v. Flannigan*[342] the accused was convicted, *inter alia*, of wrongfully using marijuana.[343] At the time of the alleged offense, the accused was an undercover investigator for the Air Force.[344] When initially questioned about the incident, the accused admitted that he did not use the "cover story" he had been given to avoid smoking marijuana.[345] The accused first claimed that he successfully had simulated using marijuana. He later said that he may have "accidentally" inhaled some smoke during the simulation. The accused thereafter acknowledged that he intentionally inhaled the marijuana smoke, but claimed "that he had been threatened with death if he turned out to be an undercover police officer and had used the marijuana to maintain his cover."[346] In a subsequent written statement, the accused again asserted that his marijuana use was accidental.

The military judge advised the members, in essence, that the simulation of drug use by a law enforcement agent pursuant to a legitimate law enforcement purpose was not wrongful.[347] The judge refused, however, to give the defense-requested instruction that *actual* use of marijuana was likewise not unlawful, if done by a law enforcement officer in furtherance of a legitimate drug enforcement operation. The Court of Military Appeals ultimately held that the judge's failure to give the defense requested instruction constituted prejudicial error.[348]

"Use" of drugs has been defined for the military as "the 'administration' ... ingestion ... or 'physical assimilation' of the drug into one's body or system."[349] To be unlawful, the use must be wrongful.[350] In this context,

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[336] *Id.* at 700.

[337] The court in *Stringfellow* therefore distinguished the case from the situation in which the accused lacks knowledge that he or she is ingesting any controlled substance. *Id.* at 700 n.2 (citing United States v. Wiles, 30 M.J. 1097 (N.M.C.M.R. 1989)); *see generally* Milhizer, *supra* note 312, at 141-42.

[338] *Stringfellow*, 31 M.J. at 700. The court in *Stringfellow* acknowledged that its holding was contrary to the holding in United States v. Dominique, 24 M.J. 766 (A.F.C.M.R. 1987), *pet. denied*, 25 M.J. 308 (C.M.A. 1987). *Dominique* appears to have been undermined by the later Court of Military Appeals decisions in *Mance* and *Myles*.

[339] The military judge in *Stringfellow* consolidated these offenses into a single specification. *Id.* at 697-98. *See generally* United States v. Griffen, 8 M.J. 66 (C.M.A. 1979); United States v. Hughes, 1 M.J. 346 (C.M.A. 1976).

[340] *Stringfellow*, 31 M.J. at 700.

[341] *Cf.* United States v. Jacobs, 14 M.J. 999, 1002 (A.C.M.R. 1982) (accused's predisposition to share small quantities of drugs with a long-time friend did not necessarily defeat entrapment as a defense to distributing large quantities of high-grade marijuana).

[342] 31 M.J. 240 (C.M.A. 1990).

[343] UCMJ art. 112a.

[344] *Flannigan*, 31 M.J. at 241.

[345] The accused previously had received disciplinary counselling regarding "sexual misconduct" and "over-indulgence" of alcohol in connection with his law enforcement duties. *Id.* The marijuana at issue was purchased from a woman with whom the accused had slept with in the nude the previous night. *Id.*

[346] *Id.*

[347] The instructions given by the military judge are set out in detail in the opinion. *See id.* at 243-44.

[348] The government in *Flannigan* conceded on appeal that the judge erred in refusing to give this instruction, but contended that the error was not prejudicial. *Id.* at 245 (citing MCM, 1984, Part IV, para. 37c(5)).

[349] United States v. Harper, 22 M.J. 157, 161 (C.M.A. 1986) (citations omitted).

[350] *Id.* at 162.

"wrongful" refers to the knowing use[351] of a prohibited drug without justification or authorization.[352] As the 1984 Manual explains, "use ... of a controlled substance is *not* wrongful if ... done pursuant to legitimate law enforcement activities." [353] Legitimate law enforcement activities include "actual drug use in the form of smoking marijuana."[354]

The court in *Flannigan* also rejected the government's contention that the duress instruction given by the military judge was sufficient to apprise the members of the law enforcement exception for wrongful drug use.[355] The court observed that the duress instruction did not extend to the situation in which the investigator reasonably believed that using marijuana was necessary solely to protect his cover.[356] Accordingly, the instructions as given inadequately addressed the relevant permissible reasons for drug use by a law enforcement agent.

Two limitations that limit the scope of conduct permitted by law enforcement officials are apparent from *Flannigan*. First, a nexus is required between the drug use and a law enforcement purpose. Drug use by a law enforcement agent is not excused or justified merely because it occurred during the course of an undercover operation. Second, law enforcement officials do not enjoy blanket immunity for all offenses committed during legitimate drug enforcement activities.[357] Therefore, the accused's adultery conviction,[358] involving his relationship with a drug suspect, was not overturned by the court.[359] Major Milhizer.

Vacations: Timing Is Everything

Rule for Courts-Martial (R.C.M.) 1108 provides that a court-martial convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence.[360] The purpose of the suspended sentence is to provide the accused a period of "probation."[361] The convening authority determines the conditions of suspension[362] and the length of suspension.[363]

If the probationer violates a condition of probation, the suspension can be vacated.[364] Of course, the misconduct that forms the basis of the vacation must occur during the period of the suspension. Actually, R.C.M. 1109(b)(1) provides, "Vacation shall be based on a violation of the conditions of suspension which occurs within the period of suspension." Application of this rule apparently should be simple.

The Case of United States v. Schwab[365]

In *United States v. Schwab* the accused pleaded guilty to numerous violations of the Uniform Code of Military Justice.[366] The military judge sentenced the accused to a

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[351] *See* United States v. Mance, 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988); *see also* United States v. Myles, 31 M.J. 7 (C.M.A. 1990). *See generally* TJAGSA Practice Note, *supra* note 332, at 36.

[352] MCM, 1984, Part IV, para. 37c(5). *See generally* United States v. Greenwood, 19 C.M.R. 355 (C.M.A. 1955); United States v. Grier, 19 C.M.R. 344 (C.M.A. 1955).

[353] MCM, 1984, Part IV, para. 37c(5) (emphasis added). The Manual illustrates this principle by explaining that "an informant who receives drugs as part of an undercover operation is not in wrongful possession" of the drugs. *Id.*

[354] *Flannigan*, 31 M.J. at 245 (citing Benchbook, para. 3-76.4*b* (C1, 15 Feb. 1985)). The cited portion of the Benchbook provides, in pertinent part, that "[u]se of a controlled substance is not wrongful if ... done pursuant to legitimate law enforcement activities (for example, an informant who is forced to use drugs as part of an undercover operation in order not to be discovered)."

[355] *Id.* at 246. For a discussion of the duress defense generally, see TJAGSA Practice Note, *Duress and Absence Without Authority*, The Army Lawyer, Dec. 1990, at 34.

[356] *Flannigan*, 31 M.J. at 246 (citing ALI *Model Penal Code and Commentaries* 22, part I, § 3.03 (1985)).

[357] *Id.* at 246 (referring to the Comprehensive Drug Abuse Prevention and Control Act of 1970, § 515(d), 21 U.S.C. § 885(d) (1982)).

[358] UCMJ art. 134; *see* MCM, 1984, Part IV, para. 62.

[359] *Flannigan*, 31 M.J. at 246 n.5 (citing United States v. Reeves, 730 F.2d 1189, 1195 (8th Cir. 1984); United States v. Odum, 625 F.2d 626, 630 (5th Cir. 1980); and Matje v. Leis, 571 F. Supp. 918, 929 n.3 (S.D. Ohio 1983)).

[360] R.C.M. 1108. The only court-martial punishment a convening authority cannot suspend is a sentence to death. *See* R.C.M. 1108(b).

[361] R.C.M. 1108(a) uses the phrase "probationary period."

[362] R.C.M. 1108(c). Note that "[u]nless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code."

[363] R.C.M. 1108(d) states that the period of the suspension may not be "unreasonably long." Army Reg. 27-10, Legal Services: Military Justice, para. 5-29 (22 Dec. 1989) [hereinafter AR 27-10], provides the following additional guidance:

> A reasonable period of suspension shall be calculated from the date of the order announcing the suspension and shall not extend beyond—
>
> (1) Three months for an SCM.
>
> (2) Nine months for an SPCM in which no BCD was adjudged.
>
> (3) One year for an SPCM in which a BCD was adjudged.
>
> (4) Two years or the period of any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer, for a GCM.

[364] *See* R.C.M. 1109(d) and (e) for specifics of the actual procedure. Note that the level of the court-martial and whether a bad-conduct discharge was adjudged at a special court-martial determine who holds the vacation hearing.

[365] 30 M.J. 842 (N.M.C.M.R. 1990).

[366] The accused entered pleas of guilty to three specifications of violations of UCMJ article 86 (failing to go to appointed place of duty), one specification of a violation of UCMJ article 92 (disobeying a lawful order), and one specification of a violation of UCMJ article 134 (breaking restriction) *Id.* at 842.

bad-conduct discharge, confinement for three months, and forfeiture of $400 pay per month for three months. The accused and the convening authority had entered into a pretrial agreement in which the convening authority agreed to suspend all confinement in excess of sixty days.[367] Because of this agreement, however, and because the accused already had spent forty-two days in pretrial confinement and had been awarded ten days of good-time credit, the accused spent only seven days in post-trial confinement.[368]

Four days after the accused was released from post-trial confinement, the accused committed additional misconduct and was returned to post-trial confinement. A vacation hearing held seven days later resulted in the accused's remaining in post-trial confinement.[369] The officer exercising general court-martial jurisdiction (OEGCMJ) approved the recommendation to vacate the suspended confinement approximately twenty-seven days later. Finally, the convening authority took action on the sentence of the court-martial thirteen days after the OEGCMJ vacated the suspended sentence.

The problem in this scenario should be apparent—the OEGCMJ vacated the accused's suspended sentence before the convening authority took action in accordance with the pretrial agreement. Accordingly, the Navy-Marine Corps Court of Military Review held in *United States v. Schwab* that "a suspension may only be vacated when there has been a violation of the conditions of that suspension" and that "the convening authority attempted to vacate a suspension which did not yet exist since he had not yet acted to suspend the required portion of the sentence."[370] As a result, the court held that it was improper to reconfine the accused and to vacate a suspension that the convening authority had not yet approved.[371]

Two things went wrong in *United States v. Schwab*: (1) the accused's misconduct did not occur within a "period of suspension"—a period that never actually was defined; and (2) the OEGCMJ improperly vacated a suspension that did not yet exist. One issue that remains, however, is whether *United States v. Schwab* means that misconduct that forms the basis of a vacation must occur after the convening authority takes action—that is, after the convening authority defines the conditions and length of the suspension.

The Case of United States v. Kendra[372]

In *United States v. Kendra* the accused was found guilty, upon mixed pleas, of numerous UCMJ offenses.[373] The accused was sentenced to a bad-conduct discharge, confinement for four months, forfeiture of $250 pay per month for four months, and reduction to pay grade E-1.[374] In accordance with the pretrial agreement,[375] the convening authority suspended the bad-conduct discharge for twelve months *from the date of trial*.[376] On the same day as action, the convening authority held a vacation hearing based on "an incident that occurred after trial."[377] Based on the results of this hearing and the recommendation of the convening authority, the OEGCMJ vacated the suspension of the punitive discharge.[378]

On appeal, the question at issue was "[w]hether the convening authority erred by vacating a suspension based upon a violation of the conditions of suspension which occurred post-trial, but prior to the convening authority's

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[367] *Id.*

[368] *Id.* at 843.

[369] *Id.*

[370] *Id.* The court cited as support for their holding R.C.M. 1109(b)(1). The court wrote that "the violation precipitating the vacation must occur within the period of the suspension." *Id.*

[371] *Id.*

[372] 31 M.J. 846 (N.M.C.M.R. 1990).

[373] At a special court-martial empowered to adjudge a bad-conduct discharge, the accused was found guilty of two violations of UCMJ article 92 (violating a general order by unauthorized possession and consumption of alcoholic beverages in the barracks), one violation of UCMJ article 111 (operating a passenger car while intoxicated), one violation of UCMJ article 112a (using cocaine), and two violations of UCMJ article 121 (larceny of an automated teller machine card and $100). *Id.* at 847.

[374] *Id.*

[375] The portion of the pretrial agreement that discussed the suspension of any punitive discharge read:

> If awarded, a bad-conduct discharge may be approved; however, it will be suspended for a period of 12 months from the date the sentence is adjudged, at which time, unless sooner vacated, it will be remitted without further action. Any violation of the UCMJ from the time the sentence is announced, not the convening authority's action, will be sufficient to initiate vacation proceedings, should the convening authority so desire.

Id. at 847 n.1.

[376] Note that the length of the suspension was within the limits of AR 27-10, para. 5-29b(3). *See supra* note 363.

[377] *Kendra*, 31 M.J. at 847.

[378] *Id.*

action suspending the bad-conduct discharge?"[379] In alleging that the vacation was improper, the appellant noted that R.C.M. 1108(b) provides that the convening authority may suspend all or a part of the sentence only after approving it, and that R.C.M. 1109(b)(1) states that vacation of a suspension must be based upon a violation of the conditions that occurs within the period of the suspension.[380] The appellant argued, therefore, that the vacation could not be based upon misconduct that took place prior to action.

The Navy-Marine Corps Court of Military Review, however, disagreed with the appellant. The court looked at R.C.M. 1108 and R.C.M. 1109, and concluded that these two rules effectively state that, while no suspension exists until the convening authority takes action, approves, and then suspends all or a portion of the sentence, a convening authority and the accused may agree that vacation of the suspended sentence may be based upon misconduct that occurs after trial but prior to action.[381]

In footnote 5 of the opinion, the court noted that R.C.M. 705(c)(2)(D) permits an accused to enter into the type of agreement that the appellant entered into with the convening authority.[382] The accused can agree to include the period after announcement of sentence, but before action, in the "period of suspension."

Lessons Learned from Schwab *and* Kendra

The first lesson counsel should learn from these cases concerns defining the period of sentence suspension. In *Schwab* the pretrial agreement did not define the period of the suspension as including the period from sentence announcement to action.[383] As a result, the accused's pre-action misconduct did not occur during the R.C.M. 1109(b)(1) "period of suspension." In contrast, *Kendra* and R.C.M. 705(c)(2)(D) explain that the accused and the convening authority can agree to define the "period of suspension" to include the period from sentence announcement until action. Accordingly, in *Kendra*, even though the misconduct occurred before the convening authority's action, it nevertheless occurred during the "period of suspension" and therefore properly formed a basis for vacation. Consequently, the first lesson learned from *Kendra* is that convening authorities should consider, on a case-by-case basis, defining the period of suspension as including the period from sentence announcement to action. This definition of the "period of suspension" ensures that the accused is on his best post-trial behavior immediately after sentence announcement, and it avoids the problem in *Schwab* of effectively giving the accused a "probation grace period" from sentence to action.

The other point that these cases emphasize is the importance of the timing of the vacation. In *Schwab* the vacation hearing, the convening authority recommendation, and the OEGCMJ approval of the recommendation to vacate "the suspension" were accomplished prior to the convening authority's taking action. In *Kendra*, however, even though the accused violated a condition of probation prior to action, the vacation hearing, the convening authority recommendation, and the OEGCMJ vacation did not take place until after action. Therefore, the other lesson to learn from these cases is that the OEGCMJ logically cannot vacate a suspension before the suspension is created by the convening authority's action—that is, only after a sentence has been suspended can it then be vacated. Accordingly, even if the "period of suspension" is defined as including the period from sentence announcement to action, and even if the accused commits misconduct during this period of suspension, vacation cannot occur until after the sentence actually has been suspended in the initial convening authority action. Waiting until action ensures that an OEGCMJ actually has a sentence suspension to vacate. Major Cuculic.

Contract Law Note

Protecting the Integrity of the Procurement Process

The United States Claims Court[384] and the General Accounting Office (GAO)[385] recently expanded the contracting officer's authority to protect the integrity of the procurement process under Federal Acquisition Regulation (FAR) 1.602-2.[386] The decisions from both the

[379] *Id.*

[380] *Id.*

[381] *Id.* at 848.

[382] R.C.M. 705(c)(2)(D) provides that an accused may offer the following condition in an offer to plead guilty:

> A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement.

[383] *Cf. supra* note 374. (pretrial agreement in *Kendra*). Remember that R.C.M. 1109(b)(1) requires that the vacation be based upon a condition of suspension that occurs within the "period of suspension."

[384] Compliance Corp. v. United States, No. 90-3896C (Cl. Ct. Dec. 12, 1990).

[385] Compliance Corp., Comp. Gen. Dec. B-239252.1 (Aug. 15, 1990), 90-2 CPD ¶ 126; Compliance Corp.—Reconsideration, Comp. Gen. Dec. B-239252.3 (Nov. 28, 1990), 90-2 CPD ¶ 435.

[386] In pertinent part, this provision requires contracting officers to "[e]nsure that contractors receive impartial, fair, and equitable treatment."

Claims Court and the GAO arose under an acquisition for administrative support services for the Naval Electronic Systems Engineering Activity (NESEA). Prior to the date for receipt of proposals, the president of Eagan, McAllister Associates, Inc. (EMA)[387] met with the contracting officer and advised him that a Compliance Corporation (Compliance) employee[388] had attempted to obtain information on EMA's proposal from an EMA employee. The contracting officer extended the date for receipt of proposals and requested that the Naval Investigative Service (NIS) investigate EMA's allegations.

The subsequent NIS report revealed that during the proposal preparation stage, Compliance's program director in charge of contracts approached EMA's assistant security manager and requested information concerning EMA's proposal and EMA's current NESEA contract. The program director also inquired about salary data and whether any of EMA's employees were interested in working for Compliance if Compliance was awarded the contract.[389] Shortly after this meeting, an EMA official found a packet of information at the EMA assistant security manager's desk containing information on EMA's proposal.[390] The EMA official then gave the packet to EMA's president. When questioned by EMA's president concerning the contents of the packet, the assistant security manager stated that she had been compromised on the solicitation because of her conversations with Compliance's program director. The assistant security manager denied that she intended to turn the packet over to Compliance, but could not explain how all the information came together in one package.

Compliance's program director also had directed a Compliance employee to access a NESEA computer database, which Compliance maintained for NESEA, to compile a list of EMA employees working on the existing NESEA contract. The employee obtained the information[391] and provided it to the program director. The program director also obtained information on EMA's health and retirement benefits.

Compliance submitted a timely proposal and, sometime thereafter, the contracting officer received the NIS report of investigation. The contracting officer reviewed the report and determined that Compliance had obtained, or attempted to obtain, an unfair competitive advantage in preparing its proposal.[392] Based on that determination, the contracting officer disqualified Compliance from further participation in the acquisition to protect the integrity of the procurement process.

Compliance protested its disqualification to GAO, stating that the contracting officer lacked authority to disqualify it from the procurement because the facts did not show that Compliance employees committed any impropriety. Compliance also argued that it was disqualified improperly from the competition without a nonresponsibility determination. In denying the protest, the GAO held that contracting officers "may protect the integrity of the procurement system by disqualifying a firm from the competition where it reasonably appears that the firm may have obtained an unfair competitive advantage."[393] The GAO further opined that under FAR 1.602, contracting officers are authorized and required to enter into contractual relationships that are in the best interests of the government and "may impose a variety of restrictions not explicitly provided for in applicable regulations, where the needs of the agency or the nature of the procurement dictate the use of such restrictions."[394] The GAO indicated that the NIS report was a proper basis for the contracting officer's determination that the improper business may have afforded Compliance an unfair competitive advantage. The GAO found that actual improprieties do not have to be shown as long as a factual basis for the contracting officer's determination existed.[395] Moreover, because Compliance was disqualified to maintain the integrity of the procurement process, a nonresponsibility determination was not required.[396]

Compliance moved for reconsideration of the GAO decision, but then sought injunctive and declaratory relief

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[387] EMA was the incumbent NESEA contractor for administrative support services and a competitor on this procurement.

[388] Compliance Corporation was also a competitor on this NESEA acquisition.

[389] Compliance's program director and the EMA assistant security manager were old friends who had worked together for another contractor. The EMA assistant security manager also was related by marriage to Compliance's president.

[390] The packet contained, among other things, EMA's technical data capabilities, the assistant security manager's resume, and a marked up statement of work for this solicitation. This information was not passed to Compliance.

[391] This information included a written list of EMA employees, their position descriptions, and the amount of time spent working on the existing EMA NESEA contract.

[392] *Compliance Corp.*, 90-2 CPD ¶ 126, at 4.

[393] *Id.* at 5.

[394] *Id.*

[395] *Id.*

[396] *Compliance Corp.*, 90-2 CPD ¶ 126, at 7.

in the Claims Court before the GAO could decide Compliance's motion.[397] The Claims Court, however, requested that GAO decide Compliance's motion for reconsideration before the parties filed briefs. The GAO affirmed its earlier decision, stating that

> accomplishing the goals of the competitive procurement system requires that the system operate with integrity. The contracting officer has the responsibility and the authority to take corrective action in appropriate circumstances, including rejecting offers based on illegally-obtained information and disqualifying firms which submit such offers. Such offers, if ignored and overlooked, would undermine an agency's efforts to obtain the statutory goal of full and open competition.[398]

Rejecting Compliance's argument that this case was merely a dispute between private parties, the GAO stated,

> The conduct engaged in by the Compliance director went beyond what can be deemed a dispute between parties with which the government need not be concerned; the conduct in fact reflects an attempt by the Compliance director to undermine by improper or illegal means the contracting officer's ability to fulfill the CICA [Competition in Contracting Act] mandate of obtaining full and open competition.[399]

The GAO concluded that the contracting officer has authority to take action in cases of "known industrial espionage concerning two competitors on a government contract, where ... [he] reasonably concluded that such conduct likely resulted in an unfair competitive advantage to a competitor under an ongoing procurement and is ultimately detrimental to the integrity of the competitive procurement process."[400]

The Claims Court heard oral arguments, with Compliance urging that because its alleged improper conduct did not violate a law or regulation and did not affect the integrity of the procurement process, the contracting officer's disqualification action was improper. Relying on the Federal Circuit's decision in *NKF Engineering, Inc. v. United States*,[401] the court held that no statutory or regulatory violation was necessary to support Compliance's disqualification because the "contracting officer's authority to disqualify Compliance based on the appearance of impropriety is inherent in his duty to 'safeguard the interests of the United States in its contractual relationships' citing 48 C.F.R. 1.602-2 (1985)."[402] The court also found that "[e]ven assuming [Compliance's] conduct itself was devoid of improper motives, what remains is the appearance of impropriety, which is the proper basis for disqualification."[403] Compliance argued that the government had not afforded it an unfair advantage; therefore, the GAO lacked jurisdiction because the "industrial espionage" allegations merely involved a dispute between private parties.[404] The court, however, distinguished this case from cases cited by Compliance in which contracting officers had taken no action in response to alleged wrongdoing. In this case, EMA alleged improper conduct, the contracting officer disqualified Compliance after finding that the alleged misconduct actually took place, and the GAO then properly reviewed the propriety of the contracting officer's action.

The court rejected the argument that industrial espionage is a private dispute that did not warrant government action. Instead, the court made clear that it would not tolerate such activity because "allowing bidders to underbid their competitors by means of 'industrial espionage' falls within the realm of conduct that impugns the integrity of the procurement, and which is the type of conduct the contracting officer has a right and a duty to deter."[405] The court found that industrial espionage was not a normal business practice and a contracting officer, having reasonably determined that such activity occurred, properly could disqualify offenders to protect the integrity of the procurement process and to deter others from similar practices.[406]

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[397] *See Compliance Corp.*, slip op. at 8.

[398] *See Compliance Corp.—Reconsideration*, 90-2 CPD ¶ 435 (citations omitted).

[399] *Id.*

[400] *Id.*

[401] 805 F.2d 372 (Fed. Cir. 1986).

[402] *Compliance Corp.*, slip op. at 11 (quoting *NKF Eng'g, Inc.*, 805 F.2d at 377).

[403] *Id.* at 11-12. Compliance argued that no standards existed to govern disqualifications based merely on the *appearance* of impropriety. The court stated, however, that "establishment of standards is not feasible under such circumstances. The guiding principle is reliance on the exercise of rational and reasonable discretion by the contracting officer in fulfilling his mandate to protect the integrity of the procurement process." *Id.* at 18.

[404] *See, e.g.*, Gallegos Research Group, Comp. Gen. Dec. B-227037 (May 8, 1987), 87-1 CPD ¶ 496; Empire State Medical Sci. & Educ. Found., Comp. Gen. Dec. B-238012 (Mar. 29, 1990), 90-1 CPD ¶ 340; Advanced Systems Tech., Inc., Comp. Gen. Dec. B-235327 (Aug. 27, 1989), 89-2 CPD ¶ 184.

[405] *Compliance Corp.*, slip op. at 13-14 n.7.

[406] *Id.* Finally, Compliance argued that it was denied due process because it did not have an opportunity to rebut EMA's allegations or respond to the NIS investigation before disqualification. The court opined that due process involves the opportunity to be heard "at a meaningful time and in a meaningful manner" and found that the Claims Court action and the GAO bid protest procedures, which included a hearing on the merits, satisfied this requirement. *Id.* at 17.

In the *Compliance Corporation* cases, the Claims Court and the GAO have enhanced the contracting officer's authority to ensure that acquisitions are free of the taint of improper business conduct, such as industrial espionage. What is particularly significant about these decisions is that the improper conduct for which the contractor was disqualified did not involve present or former government employees. The rule announced in these cases, however, is limited to instances in which the government takes action against contractors who have obtained, or have attempted to obtain, an unfair competitive advantage. Contractors are now more likely to raise these complaints, hoping for disqualification of their competitors. The Claims Court and the GAO will examine whether a contracting officer's disqualification action is reasonable based on the facts of each case. Major Kosarin.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Soldiers' and Sailors' Civil Relief Act Note

Alimony and Child Support Owed by Reserve Component Service Members Called to Active Duty

As Reserve component service members are called to active duty during Operation Desert Shield and Operation Desert Storm, family support problems are beginning to surface. Service members owing alimony and child support often have found that military service impairs their ability to meet these obligations. In particular, Reserve component service members who are paid less on active duty than in their civilian occupations are seeking relief from support requirements. The Soldiers' and Sailors' Civil Relief Act[407] (SSCRA) may provide the help they need.

The SSCRA reflects congressional efforts to avoid or remedy the adverse effects of military service, but it does not explicitly address all of the problems that may arise. Although financial agreements such as mortgages,[408] installment contracts,[409] and interest obligations[410] receive treatment under the SSCRA, other obligations do not. Even when the SSCRA does not have a specific provision providing relief from a particular obligation, several aspects of the SSCRA have generic application.

Any case in which military service materially affects a service member's ability to meet financial or legal obligations may be open to protective action under the SSCRA. Section 510 of title 50, United States Code Appendix, gives a broad statement of policy and reflects the congressional purpose in enacting the SSCRA. To ensure that national defense needs are fully met, section 510 provides "for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in ... service."[411] Endorsing this policy, the Supreme Court has noted that the SSCRA should be interpreted "with an eye friendly to those who dropped their affairs to answer their country's call."[412] This statement also reflects the approach most courts take, particularly when the person seeking relief is an activated member of the Reserve components.[413]

Obviously, if a service member has an alimony or child support obligation that predates active service, any drop in income as a result of activation adversely will affect the service member's ability to comply with the support obligation. Although this approach has met with mixed successes,[414] attorneys should be prepared to assert that section 510 has direct applicability to such a situation. The obligation to pay support in an amount beyond what is reasonable, given a soldier's current military pay, should be suspended during active service.

Section 521[415] of the SSCRA also lends support to this approach. This section provides that a court must stay a civil action or proceeding at any stage when a service member is a plaintiff or defendant unless military service does not materially affect the ability to prosecute or defend an action.[416] Because of recent changes in child support laws, timely invocation of the SSCRA in support

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[407] 50 U.S.C. App. §§ 501-548, 560-591 (1988).

[408] *Id.* § 532.

[409] *Id.* § 531.

[410] *Id.* § 526.

[411] *Id.* § 510.

[412] Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

[413] *See* Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army, Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act, JA-260, para. 1-5 (Jan. 1991).

[414] *See* Jaworski v. McCloskey, 47 N.Y.S.2d 26 (N.Y. Sup. Ct. 1944) (in view of section 501, sheriff could not be required to arrest a Navy officer for willful failure to pay alimony). *Contra* Kerrin v. Kerrin, 218 P.2d 1004 (Ca. App. 2d 1950) (service member was required to pay the difference between preservice support decree of $150 and in-service support allotment of $67).

[415] 50 U.S.C. App. § 521 (1988).

[416] *Id.*

matters is critical. Federal law now requires that each state have a procedure that makes any payment of child support pursuant to a court order a judgment on and after the date the payment is due.[417] Under this provision, if a service member is in arrears in child support, a deficiency judgment automatically becomes effective by operation of law. It has "the full force, effect, and attributes of a judgment of the [s]tate" concerned, including enforceability.[418] Additionally, retroactive modification is curtailed substantially; the law allows retroactive modification only for periods during which a petition for modification is pending.[419]

As a consequence of the child support requirements, attorneys should file petitions for modification of support orders as expeditiously as possible. Although retroactive effect may be possible for a modification of alimony, retroactivity of child support modifications will require quick actions by the service member's attorney. Legal assistance attorneys should consider a stay of enforcement action pursuant to the SSCRA as a means of intermediate relief. In support of the argument that a change in circumstances compels a modification, attorneys should be prepared to discuss the policy reasons behind the SSCRA. Specifically, they should remember the admonition in section 510 that military service should not adversely affect the rights of those in the military service. A potentially significant cut in pay, combined with a continuing requirement to pay support in preservice amounts, will have such an adverse effect on a service member. Major Pottorff.

Tax Note

President Paves Way for Tax Benefits by Declaring Persian Gulf Area a Combat Zone

In a move that will bring significant tax breaks to service members serving in Operation Desert Storm, President Bush issued an executive order declaring the Arabian Peninsula area, airspace, and adjacent waters a combat zone.[420] This action triggers Internal Revenue Code (IRC) provisions that permit service members serving in the declared combat zone to exclude military pay from gross income and that significantly extend their tax filing deadlines.

The executive order designates the following locations as falling within the combat zone: the Persian Gulf; the Red Sea; the Gulf of Oman; the Gulf of Aden; that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude; and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.[421] For purposes of the executive order, the effective date for the commencement of combatant activities is January 17, 1991.

Pursuant to IRC section 112, enlisted service members and warrant officers serving in an area designated as a combat zone are entitled to exclude all active service military pay from federal income taxation.[422] The exclusion is limited to $500 per month for commissioned officers serving in the zone. Commissioned warrant officers are not treated as commissioned officers for purposes of this limitation and accordingly are entitled to exclude all military pay earned while serving in a combat zone.[423]

The exclusion also applies to compensation received by service members while hospitalized as a result of wounds, disease, or injury incurred in the designated combat zone.[424] The exclusion is not available, however, to civilian noncombatants or members of the Merchant Marine serving within the combat zone.[425]

Service members who serve in the designated combat zone for only part of the month are entitled to the exclusion for the entire month.[426] This includes service members who are serving in the combat zone on temporary duty (TDY) status.[427] Thus, soldiers serving in the combat zone for as little as one day while in a temporary duty status are entitled to the combat zone exclusion for the entire month.

Moreover, service members serving in an area outside the combat zone in direct support of military operations inside the zone under conditions that entitle them to

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[417] Pub. L. No. 99-509 § 9103(a), 100 Stat. 1973 (1986) (codified at 42 U.S.C. § 666(a)(9) (1988)).

[418] 42 U.S.C. § 666(a)(9)(A) (1988).

[419] *Id.* § 666(a)(9)(C).

[420] Exec. Order No. 12744, *reprinted in*, 56 Fed. Reg. 2661 (1991).

[421] *Id.*

[422] I.R.C. § 112 (West Supp. 1990).

[423] Treas. Reg. § 1.112-1(g) (1970).

[424] Treas. Reg. § 1.112-1(a)(1)(ii) (1970).

[425] Commissioner v. Prussia, Rev. Rul. 70-537; 1970-2 C.B. 17.

[426] Treas. Reg. § 1.112-1(b) (1970).

[427] Treas. Reg. § 1.112-1(k) (1970).

receive hostile fire pay are deemed to have served in the combat zone.[428] For example, soldiers serving in a Patriot missile battery in Israel who are receiving hazardous duty pay may be entitled to the section 112 combat pay exclusion.

Treasury regulations specify that the combat zone exclusion is not available to service members present in the combat zone in three limited circumstances.[429] The exclusion is not available to service members who fly through a combat zone between two points lying outside the combat zone, are on leave in a combat zone from a duty station outside the zone, or are in the combat zone solely for their own personal convenience.

President Bush's executive order also triggers an automatic statutory extension of the Federal income tax filing deadline for all civilians and service members serving in the designated combat zone.[430] Under IRC section 7508, civilians and service members have up to 180 days following their return from service in the combat zone to file federal income tax returns. Moreover, civilians and service members hospitalized because of injuries received in the combat zone have until at least 180 days after completing a period of continuous hospitalization to file a return.[431] The filing extension is limited to a total of five years, however, if hospitalization is in the United States.

Section 7508 directs that the assessment of interest, penalties, and additions to tax be disregarded during the period extending up to 180 days after service in the combat zone or hospitalization for injuries incurred in the zone. In addition, the time limits for paying income taxes past due, for filing any petition for a tax deficiency, for filing a claim for a refund, or for bringing a suit for refund are suspended until 180 days after completing service in the combat zone or hospitalization. Section 7508 relief has been made retroactive to August 2, 1990, for all civilians and service members serving in the combat zone.

A final tax benefit resulting from President Bush's executive order is available to survivors of service members who die in the combat zone. IRC section 692 abates all income taxes due for the tax year in which a service member dies while serving in a combat zone or as a result of disease, death, or injury incurred while serving in a combat zone.[432] Tax abatement is available even if no causal relationship existed between military action and the death or the injury or disease that caused the death.[433] Major Ingold.

Family Law Note

Arguing a Court's Lack of Jurisdiction to Defeat a Former Spouse's Claim to a Soldier's Military Pension

The Uniformed Services Former Spouses' Protection Act[434] (USFSPA) allows courts to divide disposable military retired pay pursuant to state law for purposes of satisfying alimony and child support obligations. Under the USFSPA, state courts also may divide military pensions as marital or community property pursuant to state law.[435]

Typically, a court with the jurisdiction to grant a soldier or military retiree a divorce and to divide the marital property also can order that military retired pay be used to satisfy child support or alimony obligations. Legal assistance attorneys should recognize, however, that the same court may lack jurisdiction to order that military retired pay be divided as marital property.

State law controls the issue of whether a court has jurisdiction over a soldier or a retiree for the purposes of dividing military retired pay to satisfy child support or alimony obligations.[436] In an apparent attempt to limit forum shopping by estranged spouses, however, Congress has restricted severely the ability of state courts to exercise jurisdiction over the division of disposable military retired pay as marital property. Courts seeking to

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[428] Treas. Reg. § 1.112-1(j) (1990). The Treasury Regulations provide several examples to illustrate this provision. One example based on the Vietnam conflict concerns a soldier assigned to Vietnam who crosses into Cambodia in direct support of military operations in Vietnam. The soldier is entitled to hostile fire pay. The soldier also is deemed to have served in the Vietnamese combat zone. *Id.*, example (1).

[429] Treas. Reg. § 1.112-1(l)(1970).

[430] I.R.C. § 7508 (West Supp. 1990), as amended by Pub. L. No. 102-2 (1991).

[431] *Id.*

[432] *Id.* § 692(a).

[433] *Id.* This provision must be distinguished from IRC § 692(c), which requires a causal connection between death and military or terrorist action. Section 692(c) offers tax abatement for service members and civilians who die from wounds or injuries incurred outside the United States as a result of terrorism. Tax abatement under this section is available not only for the year of death or injury causing death, but also for the year prior to death or injury causing death.

[434] The portion of the USFSPA dealing with division of military disposable retired pay as marital property and direct payment of disposable military retired pay to satisfy alimony or child support obligations is codified at 10 U.S.C. § 1408 (1988).

[435] Currently, all states except Alabama recognize by statute or case law that military pensions can be divided as marital or community property. Some states, however, allow only vested pensions to be divided.

[436] 10 U.S.C. § 1408(c)(4) (1982) (sufficient "minimum contacts" to satisfy constitutional due process concerns must exist).

divide military retired pay as marital or community property must have *in personam* jurisdiction over the soldier or retiree based on:

(1) His or her domicile[437] in the state or territory; or

(2) His or her residence in the state or territory "other than because of military assignment"; or

(3) His or her consent to the jurisdiction of the court.[438]

These requirements can be used to the great advantage of soldiers still on active duty. To take full advantage of these jurisdictional protections, legal assistance attorneys must understand the significance of domicile.

Every individual has a domicile. The term "domicile" is not defined in the USFSPA. By general acceptance, however, domicile is not the same as residence. The critical factor is whether or not the subject intended to make a particular place "his [or her] house for the time at least."[439] A common misperception is that a soldier's domicile is the same as his or her home-of-record. The intent to establish domicile usually is expressed through a soldier's: (1) paying local and state income taxes; (2) paying state or local personal property taxes; (3) registering to vote in the state; (4) obtaining state driver and vehicle licenses; and (5) commiting any other act that signifies an intention to make a particular state a permanent home.

Unless the soldier is stationed in his or her home-of-record state, a court generally[440] can obtain jurisdiction over the soldier for the purposes of dividing military pension only with the soldier's consent.[441] While at least one state always will have jurisdiction to divide the soldier's pension as marital or community property, it may not be the state of the estranged spouse's choosing. Accordingly, a soldier may have a valuable bargaining chip that can be used to obtain corresponding concessions from the estranged spouse.

Preserving the USFSPA's jurisdictional protection, however, requires careful planning. A general appearance by a soldier in a divorce action constitutes "consent." Unless a soldier appears "specially," he or she will be deemed to have consented to the court's jurisdiction to divide the military pension as marital property regardless of whether the court is located in his or her state of domicile.[442]

Undoubtedly, many soldiers involved in divorce actions unwittingly appear through their civilian counsel and "grant" jurisdiction to courts otherwise ineligible to divide their military pensions as marital property. Legal assistance attorneys can minimize these occurrences by impressing on their clients, and also on their client's civilian counsel, the potential significance of the USFSPA's jurisdictional protection. Major Connor.

Professional Responsibility Note

Alabama Adopts Model Rules

Alabama recently adopted an amended version of the American Bar Association (ABA) Model Rules of Professional Conduct.[443] The new rules became effective on January 1, 1991, and apply to all lawyers licensed in Alabama.

The Alabama version contains several significant differences from the Army rules and the ABA Model Rules. Alabama rule 1.3 establishes that an Alabama attorney can be disciplined only for "willful neglect" of a matter. The lower standard provided in both the Army and ABA version of rule 1.3 establishes that an attorney may be disciplined for failure to act with "reasonable diligence and promptness" in a matter.[444]

Another significant modification in the Alabama version of the rules concerns the requirement to report misconduct. Alabama rule 8.3 requires attorneys to report any unprivileged knowledge of a violation of rule 8.4. The Army and ABA version of rule 8.3, however, mandates reporting of a violation only if it raises a substantial question concerning another attorney's honesty, trustworthiness, or fitness to practice law.[445]

Alabama's version of rule 3.3, unlike either the Army or ABA version, eliminates a lawyer's duty to disclose to a tribunal authority adverse to a client's position. Other differences between the Alabama rules and the ABA Model Rules concern division of fees, providing emergency financial assistance to clients, and certification of attorneys in practice areas. Major Ingold.

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[437] The term "domicile" is not defined in the USFSPA. Domicile, however, is not the same as "residence." The critical factor is whether or not the subject intended to make a particular place "his house for the time at least." Restatement (Second) of Conflict of Laws § 18 (1971).

[438] *Id.*

[439] *See supra* note 434.

[440] A court also can establish jurisdiction to divide a military pension as marital or community property based on a soldier's establishing residence in the state for reasons other than assignment by military orders. This provision clearly would ensnare many retirees because they would not be residing in a locale on military orders. How this provision would apply to active duty soldiers is less clear, particularly if they were engaged in no outside employment while assigned in a state.

[441] *See, e.g., In re* Hattis, 242 Cal. Rptr. 410 (Cal. 1987) (no jurisdiction to partition military retired pay of a former domiciliary despite adequate "minimum contacts"); Mortenson v. Mortenson, 409 N.W.2d 20 (Minn. Ct. App. 1987) (state long-arm statute preempted by the USFSPA); Petters v. Petters, 560 So.2d 722 (Miss. 1990) (state long-arm statute preempted by the USFSPA).

[442] *See, e.g.*, Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).

[443] *ABA/BNA Lawyer's Manual on Professional Conduct*, No. 99 (Dec. 19, 1990).

[444] Dept. of Army Pam. 27-26, Rules of Professional Conduct for Lawyers, rule 1.3 (Dec. 31, 1987).

[445] *Id.* rule 8.3.

Claims Report

United States Army Claims Service

Liability for Providing Alcohol in a Social Setting and for Failing to Detain Intoxicated Drivers

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Introduction

"Intoxicated drivers" and "automobile accidents" are two terms that all too often go together with disastrous consequences and that result in tort claims. Claimants' attorneys, ever mindful of the growing public concern over the carnage caused by intoxicated motorists, have broken new ground in the pursuit of a tort remedy against the United States for injuries arising from accidents caused by intoxicated motorists.

The scenario with which claims attorneys and investigators are most familiar occurs when an already intoxicated patron is served or sold additional alcoholic beverages at a bar, tavern, or packaged beverage store. Actually, this is the situation to which "dram shop act" statutes typically are directed. A substantial number of tort claims against the Army, sister military services, and other federal agencies, however, have been based upon distinctly different theories involving two recurring fact patterns. The first involves automobile accidents following social gatherings of government employees, both sanctioned and unsanctioned, at which alcoholic beverages were served or made available. The second involves the alleged failure of police officials—and by extension military superiors—to prevent intoxicated persons from subsequently operating a motor vehicle. This article addresses several of the relevant legal and factual issues in claims arising from these two recurring fact patterns that Army claims judge advocates must be familiar with to protect the Army's interests.[1]

Common Concerns

In claims arising from either scenario, if the intoxicated driver is a government employee, the threshold issue for investigation is whether the driver was acting within the scope of employment at the time of the accident.[2] In actions under the Federal Tort Claims Act (FTCA), the scope of employment issue must be determined by reference to state law.[3] In some states, the mere fact that the employee was intoxicated at the time,[4] even if the employer's rules or regulations prohibit this conduct,[5] will not place the driver's actions outside the scope of employment as a matter of law. An in-depth investigation of this issue, therefore, will be necessary.

In addition, whether a claimant alleges that the United States is liable either for serving, providing, or making alcoholic beverages available to a driver in a social setting,[6] or for failing to detain the driver once he or she reached the point of intoxication, the driver's actions subsequent to those alleged acts of negligence must be investigated thoroughly. For instance, if an investigation revealed that the driver continued drinking elsewhere, this evidence could support a defense that intoxication occurred subsequent to the driver's final contact with government employees or could identify a basis for contribution from a potential third party defendant.

Liability Arising from the Provision of Alcoholic Beverages in a Social Setting

The "promotion party," the "PCS party," the "annual unit picnic," and various other social gatherings of military personnel have given rise to a number of claims in recent years. The typical allegation is that a soldier or other guest at the party was provided with alcoholic beverages after he or she obviously was intoxicated, and that the continued serving of alcoholic beverages to that individual constituted an actionable breach of duty. The additional allegation, that a duty to prevent the guest from operating a motor vehicle by physical means existed once he or she became intoxicated, involves concerns that this article will address later.

While a distinct minority of states currently recognizes a cause of action against an ordinary social host who

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[1] Situations involving military personnel who are involved in motor vehicle accidents while operating government vehicles, purportedly while performing military duties, are beyond the scope of this article.

[2] *See* 28 U.S.C. § 1346(b), 2672 (1982).

[3] Williams v. United States, 350 U.S. 857 (1955); McSwain v. United States, 422 F.2d 1086, 1088 (3d Cir. 1970).

[4] Fitzpatrick v. United States, 726 F. Supp. 975 (D. Del. 1989); G. & H. Equip. Co. v. Alexander, 533 S.W.2d 872 (Tex. App. 1977).

[5] *E.g.*, Coleman v. Donaho, 559 S.W.2d 860 (Tex. App. 1976).

[6] While "serving alcoholic beverages," "providing alcoholic beverages," and "making alcoholic beverages available" may constitute somewhat different actions with potentially different legal consequences, these various concepts hereinafter will be referred to as "providing alcoholic beverages."

provides alcoholic beverages to intoxicated adult guests,[7] claims that apparently are premised on that theory merit careful investigation. The law on this issue is not well settled in many states and additional theories of liability may be advanced after the facts have grown too stale for an adequate investigation.

When the intoxicated guest or driver is also an employee of the United States, practitioners must focus their legal research on cases in which an employer-employee relationship existed between the host and the guest who subsequently drives while intoxicated. Those cases may receive different judicial treatment than the typical social host situation because of the persuasion, influence, or control that the employer may be able to exercise over an employee.[8]

Because the legal age for consumption of alcoholic beverages in most states is now twenty-one years of age, and many of the soldiers attending the social functions are often younger, the issue of civil liability for providing alcohol to minors may be raised. Claims attorneys should be aware that some jurisdictions that have rejected social host liability for incidents involving the provision of alcoholic beverages to adults have been willing to impose liability when the alcohol was provided to a minor.[9] When minors are present at social functions, merely serving an alcoholic beverage to a minor without taking reasonable measures to ascertain whether he or she is of legal drinking age may constitute actionable negligence.[10] This represents a significant departure from the legal standard traditionally applied in dram shop statutes, which requires "continued service after obvious intoxication."

Whether the alcoholic beverages are provided to a minor or to an adult, for the United States to be held liable under the FTCA, the claimant must show that the government agent or employee was acting within the scope of employment when the negligent act or omission occurred.[11] All factual matters that may bear on the resolution of the scope of employment issue must, therefore, be scrutinized. The scope of employment inquiry necessarily must go beyond whether or not the driver and host were government employees.

Identifying who constitutes the "host" in the setting of an informal unit function may prove to be problematic. Because the majority, if not all, of the "guests" at these gatherings are government employees who may be deemed to be co-hosts or agents of the host, the scope of employment investigation also should address the status of the "guests." Examining the status of the "guests" is particularly important when some of the attendees are superior in rank or grade to, or occupy some position of leadership or responsibility over, the individual who subsequently drives while intoxicated.

Several factors should be examined in investigating the scope of employment issue in the social host context. The following list of factors is not exclusive:

(1) Was the site of the function an "assigned place of duty" for the participants?

(2) What was the duty status of the participants at the time of the function?

(3) Was the function held during normal duty hours?

(4) Did anyone use military authority to compel or encourage attendance at, or participation in, the function?

(5) Was the function held in a government controlled facility?

(6) Did any supervisor or military superior authorize the function or have advance knowledge of the function and acquiesce in some manner in permitting the function to be held?

(7) What was the source of the funds used to purchase the alcoholic beverages and other refreshments, food, or supplies for the function?

(8) What regulatory restrictions—including those established at the installation and unit levels—were violated in holding the function at that particular time, place, and manner or in celebrating the particular event?

(9) What regulatory restrictions—including those established at the installation and unit levels—were violated by the government employees' possessing, using, or serving alcoholic beverages at the particular time, place, manner, or type of event in question?[12]

The significance of the assorted regulations dealing with possessing, consuming, and providing alcoholic

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[7] *See* Annotation, *Social Host Liability*, 62 A.L.R. 4th 16 (1975).

[8] *See* Annotation, *Liquor—Employer's Liability*, 51 A.L.R. 4th 1048 (1973) (cases addressing employee-employer relationships).

[9] *See* Annotation, *supra* note 7 (cases addressing issue of liability for serving alcoholic beverages to minors).

[10] Walker v. Key, 686 P.2d 974 (N.M. App. 1984).

[11] 28 U.S.C. § 1346(b) (1982).

[12] *See, e.g.*, Army Reg. 215-2, Morale, Welfare and Recreation: The Management and Operation of Army MWR Programs and NAFIs, chap. 4. (21 Nov. 1988).

beverages in resolving the scope of employment issue will vary depending upon the state law governing this issue. In some jurisdictions, the fact that an employer has forbidden a particular course of conduct by rule or regulation does not bar a finding that the prohibited act was taken within the scope of employment when the employee was otherwise acting in an effort to further some interest of the employer.[13] Accordingly, unit morale, welfare, and recreation conceivably could be found to constitute such an interest.

Regulations dealing with possessing, consuming, and providing alcoholic beverages have significance beyond any impact they may have on resolving the scope of employment issue. Claimants' attorneys may contend that the regulations are the source of an actionable duty, even in jurisdictions that have rejected social host liability in other settings. The liability of the United States under the FTCA, however, is no greater than that borne by private individuals under the law of the state in which the negligent act or omission occurred.[14] Therefore, obligations and requirements set forth in federal regulations should not create actionable duties under the FTCA unless the same or similar duties extend to private individuals under state law.[15]

Nevertheless, in a substantial number of cases, federal courts have concluded that post regulations may give rise to an actionable duty.[16] Claims attorneys investigating this type of claim must, therefore, become thoroughly familiar with any regulations concerning the possession, use, and provision of alcoholic beverages on military installations and during sponsored social activities.

Liability Based upon Failure to Prevent an Intoxicated Person from Subsequently Driving While Intoxicated

Attorneys advancing tort claims under the theory that a duty existed to prevent an individual who appeared to be intoxicated from subsequently driving while intoxicated often refer to state statutes that require police officials to detain intoxicated drivers. In several cases that have been brought under this theory, various courts have applied the "public duty" doctrine to hold that these statutes create a duty toward the public at large, rather than a duty in favor of particular individuals, and that the statutes therefore do not create a duty actionable in tort.[17]

While the United States has received the benefit of the "public duty" doctrine in a number of cases involving the alleged failure to detain intoxicated drivers,[18] the doctrine has been rejected in some states.[19] A few states that generally embrace the "public duty" doctrine have held exceptions to the doctrine applicable under the particular facts of cases involving the failure to apprehend an intoxicated driver.[20]

Furthermore, courts in some states have determined that the "public duty" doctrine actually is a specialized application of sovereign immunity that protects states and municipalities from liability for the otherwise tortious acts of their government employees.[21] In states that have interpreted the "public duty" doctrine in that manner, the doctrine will not shield the United States from liability, even if it is applied to state court cases involving the failure to detain intoxicated drivers, because the liability of the United States under the FTCA is to be determined without reference to immunities conferred upon public officials and public entities under state law.[22]

In jurisdictions in which state law does not mandate the detention of an intoxicated individual, a claimant's attorney may assert that an installation regulation or other agency regulation gives rise to that duty. As noted earlier, agency regulations should not give rise to an actionable duty in the context of this type of claim because, notwithstanding the requirements imposed by a regulation, the Federal Government's liability cannot be greater than the liability borne by private individuals in the particular

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[13] Erwin v. United States, 302 F. Supp. 693 (W.D. Okla. 1969); Coleman v. Donaho, 559 S.W.2d 860 (Tex. App. 1976).

[14] 28 U.S.C. § 2674 (1982); Cox v. United States, 881 F.2d 893 (10th Cir. 1989); O'Neal v. United States, 814 F.2d 1285 (9th Cir. 1987); Ewell v. United States, 776 F.2d 246 (10th Cir. 1985).

[15] Chen v. United States, 854 F.2d 622 (2d Cir. 1989); Freedman v. United States, 694 F.2d 1202 (9th Cir. 1985); Doe v. United States, 718 F.2d 1039 (11th Cir. 1983); La Suer v. United States, 617 F.2d 1197 (5th Cir. 1980).

[16] Rouse, *Actionable Duty Based on Military Regulations*, The Army Lawyer, Aug. 1989, at 48.

[17] *E.g.*, Fessler by Fessler v. R.E.J., Inc., 514 N.E.2d 515 (Ill. App. 1987); Schaffrath v. Village of Buffalo Grove, 513 N.E.2d 1026 (Ill. App. 1987); Guidry v. Airport Auth. for Dist. No. 1, 558 So. 2d 300 (La. App. 1990); Ashburn v. Anne Arundel County, 510 A.2d 1078 (Md. 1986); Jones v. Maryland-National Capital, 571 A.2d 859 (Md. App. 1990); Makris v. City of Grosse Pointe Park, 448 N.W.2d 352 (Mich. App. 1989); Schutte v. Sitton, 729 S.W.2d 208 (Mo. App. 1987); Spotts v. City of Kansas City, 728 S.W.2d 242 (Mo. App. 1987); Barrat v. Burlingham, 492 A.2d 1219 (R.I. 1985).

[18] Crider v. United States, 885 F.2d 294 (5th Cir. 1989); Louie v. United States, 776 F.2d 819 (9th Cir. 1989).

[19] *E.g.*, Busby v. Municipality of Anchorage, 741 P.2d 230 (Alaska 1987); Ryan v. State, 656 P.2d 597 (Ariz. 1982); Leake v. Cain, 720 P.2d 152 (Colo. 1986) (rejecting "no duty" doctrine, but holding no liability for officer's failure to apprehend intoxicated motorist on basis of no duty toward third persons and officer's qualified immunity for discretionary acts under state law); Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984); Karbel v. Francis, 709 P.2d 190 (N.M. App. 1985); Dewald v. State, 719 P.2d 643 (Wyo. 1986).

[20] *E.g.*, Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987).

[21] Leake v. Cain, 720 P.2d 152 (Colo. 1986); *Schear*, 687 P.2d at 728.

[22] 28 U.S.C. § 2674 (1982); United States v. Muniz, 374 U.S. 150 (1963); *Crider*, 885 F.2d at 296; Wright v. United States, 719 F.2d 1032 (9th Cir. 1983).

state. In *Doggett v. United States*,[23] however, the Ninth Circuit concluded that a naval installation regulation requiring the detention of persons who appeared to be intoxicated did give rise to an actionable duty.[24]

One of the arguments often advanced to support a finding of an actionable duty based on a post regulation or other agency regulation is that the promulgation of the regulation, or actions taken in compliance with the regulation, constitute the voluntary undertaking of a task and assumption of a duty under the "good samaritan" doctrine.[25] The "good samaritan" doctrine, as set forth in Restatement (Second) of Torts, section 323, provides, however, that for liability to attach under that doctrine—in situations in which the alleged tortfeasor neither created the peril nor acted affirmatively so as to increase the risk of harm—the plaintiff must show that he or she relied on the undertaking.

Often claimants will be unable to show that the risk of harm to them was increased in any way either by the promulgation of the regulations at issue or by actions taken in furtherance of those regulations. Furthermore, rarely will a claimant be able to show the requisite reliance in forming his or her decision to venture onto or near the roadway. The breach of a regulation that mandates a particular course of conduct does not, therefore, automatically give rise to liability under the "good samaritan" doctrine.[26]

When the intoxicated driver is a soldier, the claimant may argue that a "special relationship" existed between the driver and the service, giving rise to a duty under the Restatement (Second) of Torts, section 315(b), to control the driver. In *Louie v. United States*,[27] after determining that the "public duty" doctrine applied, the Ninth Circuit confronted the argument that the driver's military status and the military's authority to control off-duty soldiers gave rise to a special relationship. In rejecting the argument, the court noted that decisions of the United States Supreme Court in *Chappell v. Wallace*[28] and *United States v. Shearer*[29] gave clear guidance that "federal courts should refrain from interfering in matters of military structure, supervision and discipline."[30]

In some cases in which a duty to attempt to control an intoxicated individual arguably existed, and in which the measures taken in an attempt to exercise control proved to be inadequate, the discretionary function exception to the FTCA[31] may be interposed. The discretionary function defense should be considered in cases in which an applicable regulation prescribes only one permissible course of action and the claimants assert that acting in compliance with the regulation constituted negligence. The discretionary function defense also should be considered in cases in which a mandatory duty to act existed, but a number of possible remedial measures were available and the selection of an otherwise permissible measure is criticized because other alternatives might have been more effective.[32] The defense is particularly attractive in cases in which judicial evaluation of the relative merits of various courses of action would require a court to become involved in the type of second-guessing of military decisions that the United States Supreme Court cautioned against in *Shearer*.

The factual investigation of a claim based on failure to detain an intoxicated individual should address the following concerns:

(1) What regulations, directives, policy letters, or orders have been given on the subject of measures to be taken when a soldier or other individual is suspected to be intoxicated under circumstances indicating that he or she may thereafter attempt to operate an automobile?

(2) What additional guidance on this subject have been given to the allegedly negligent actors through safety briefings, counseling sessions, or meetings?

(3) What indicia of intoxication or sobriety were observed by the allegedly negligent actors and what was the character and duration of their contact with the intoxicated individual?

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[23] Doggett v. United States, 858 F.2d 555 (9th Cir. 1988).

[24] *Id.* at 564-65.

[25] Sheridan v. United States, 108 S. Ct. 2449 (1988); Doggett v. United States, 858 F.2d 555, 566 (9th Cir. 1988).

[26] *See, e.g.*, Southern Pac. Trans. Co. v. United States, No. CV 88-1170 RSWL (C.D. Cal. filed May 25, 1990).

[27] 776 F.2d 819 (9th Cir. 1989). In *Louie* an off-duty soldier, while driving a car off post, was arrested by a local deputy sheriff for driving under the influence of alcohol. The sheriff's office coordinated with military police officials, advising them of the arrest and the nature of the charge. Subsequently, arrangements were made to return the soldier to military control. After the soldier was returned to post, a military policeman—who subsequently denied knowledge of the soldier's previous arrest—was dispatched to transport the soldier to his quarters. Later that night, the soldier drove an automobile into a head-on collision with Mr. Louie's car, injuring Mr. Louie fatally. *Id.*

[28] 462 U.S. 296 (1983).

[29] 473 U.S. 52 (1985).

[30] *Louie*, 776 F.2d at 827.

[31] 28 U.S.C. § 2680(a) (1982).

[32] *See, e.g.*, Southern Pac. Trans. Co. v. United States, No. CV 88-1170 RSWL (C.D. Cal. filed May 25, 1990).

(4) If significant indicia of intoxication were not observed, is that possibly because of the failure of a particular individual, such as a charge of quarters, to perform a mandatory inspection or other assigned duty?

(5) What was the military relationship between the allegedly negligent actor and the intoxicated individual?

(6) What measures, if any, were undertaken by the allegedly negligent actor to determine whether the intoxicated individual actually was intoxicated?

(7) What measures, if any, were undertaken by the allegedly negligent actor to discourage or to prohibit the subsequent use of a motor vehicle by the intoxicated individual and why were those measures ineffective?[33]

Conclusion

With both the "social host" type of claim and the type of claim involving failure to control or detain an intoxicated individual who subsequently drives while intoxicated, claims attorneys and investigators face an imposing challenge. In both types of cases they must identify government regulations, directives, and policy letters that arguably pertain to the incident at issue. They must be prepared to meet the argument that either the regulations or an unsuccessful effort to exercise control over an individual gave rise to an actionable duty. The argument that a duty to detain arose because military status established a "special relationship" between the allegedly negligent actor and the intoxicated individual also must be addressed. With either type of claim, a timely and thorough investigation of the incident giving rise to the claim—an investigation that goes beyond the scope of the claimant's original theory of liability—may save the United States from unforeseen "disastrous consequences" at trial.

Claims Policy Notes

Signing DD Form 1843, Demand on Carrier/Contractor

This Claims Policy Note updates paragraph 3-21b(3) and figure 3-17 of Department of the Army Pamphlet 27-162. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

Due to an unfortunate oversight, figure 3-17 and paragraph 3-21*b*(3) of Department of the Army Pamphlet 27-162, Legal Services: Claims (15 Dec. 1989) [hereinafter DA Pam 27-162], provide contradictory guidance on preparing the DD Form 1843 for forwarding to USARCS for centralized recovery. While both figure 3-17 and paragraph 3-21*b*(3) correctly provide that field offices not enter a dispatch date in block 13c, only figure 3-17 correctly instructs field offices to sign the form in block 13a ("Dispatcher"). Paragraph 3-21*b*(3) incorrectly states that field claims office personnel will *not* sign in block 13a.

Accordingly, field claims offices should adhere to the following guidance when completing DD Form 1843. On files forwarded for centralized recovery using the 1 December 1988 edition of DD Form 1843, field claims office personnel will sign block 13a ("Dispatcher"), insert the appropriate telephone number in block 13b ("Telephone Number"), and leave blank block 13c ("Date Dispatched"). On files forwarded for centralized recovery using the 1 January 1972 edition of DD Form 1843, which offices may use until stocks are exhausted, field claims office personnel will sign the "Signature" block and leave the "Date Dispatched" block blank.

As a final note, the USARCS telephone system has changed. Telephone number (301) 677-5995, referenced in the discussion to figure 3-17, is no longer in service. On claims forwarded to USARCS for centralized recovery, *all* field claims offices are directed to insert the telephone number (301) 677-7789/5775 in block 13b ("Telephone number"). Ignore the reference in block 13b to "paragraph 3-20g." Mr. Frezza.

Transmitting AAFES Claims Under $2500 for Payment

This Claims Policy Note amends the guidance found in paragraph 12-7b(2) of Army Regulation 27-20. In accordance with paragraph 1-9f, Army Regulation 27-20, this guidance is binding on all Army claims personnel.

The Army-Air Force Exchange Service (AAFES) is eliminating the exchange regions and consolidating their functions in a new Operations Support Center.

Accordingly, claims approval and settlement authorities will transmit AAFES claims that are not over $2500 for payment from AAFES funds to: Army-Air Force Exchange Service, OSC-FA-CLAIMS (ATTN: Ms. Ball), P.O. Box 650405, Dallas, TX 76265-0405. The commercial telephone number for this office is (214) 280-7874. Claims over $2500 will continue to go to the address listed in paragraph 12-7*b*(1) of Army Regulation 27-20, Legal Services: Claims (28 Feb. 1990) [hereinafter AR 27-20].

As stated in paragraph 12-7*a*, for all claims except household goods and hold baggage claims of AAFES employees, the approval or settlement authority will transmit the original and one copy of the claim form, the action by the approval or settlement authority, and the settlement agreement (if appropriate). For household

[33] *See* Annotation, *Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer*, 48 A.L.R. 4th 320 (1973) (providing more detailed exposition of various legal issues and theories of recovery in cases involving alleged failure to detain or apprehend an intoxicated driver).

goods and hold baggage claims, the approval or settlement authority will transmit the entire claim file so that AAFES can effect carrier recovery. Mr. Frezza.

Personnel Claims Notes

Depreciation on Items with Uncertain Purchase Dates

Occasionally claimants do not state, cannot remember, or simply guess when items were purchased. Normally, claims personnel should presume that items claimed were purchased in the month and year listed on DD Form 1844. If, however, the purchase dates that a claimant lists appear improbable, the claims examiner first should determine whether the claimant's purchase dates are accurate and credible, and then take appropriate depreciation on the items if they are not.

Factors that may indicate inaccurate purchase dates include large numbers of items purchased shortly before pickup; obsolete consumer items, such as reel-to-reel tape decks or Beta system videocassette recorders, purchased recently; expensive items that the claimant would have had difficulty affording which were purchased shortly before the shipment; and items allegedly bought after the pickup date. The claimant's overall credibility also should be considered.

If only a few dates or relatively inexpensive items appear inaccurate, the claims examiner should resolve doubts in the claimant's favor. Factors to consider in making this determination include the useful life of the item, the age of other items the claimant owns, and the claimant's credibility. When doubts persist, the examiner should direct the claimant to substantiate purchase dates by providing receipts, cancelled checks, credit card statements, or photographs. Destroyed items should be inspected.

When the purchase dates listed for items apparently are not accurate and purchase evidence is not available, a claims examiner should ask the claimant for more information. Examples of the kinds of questions a claims examiner should ask are: Was the item purchased new or used? Was it a gift? Who gave it to you? Where were you stationed when you got the item?

These questions often help a claimant better remember when and how the items were obtained. A claimant often will respond, "I don't remember the exact date, but I was stationed at Fort Hood. I was there from ...." This response provides enough information for an examiner to establish a basis for an adjudication. If, on the other hand, these types of questions do not help a claimant remember, depreciate the item as if it were at least five years old unless the weight of the evidence indicates the item is older.

A few claimants list false purchase dates to avoid depreciation. If the evidence clearly indicates that the claimant's dates were not merely inaccurate, but actually were falsified, the claims examiner should consider applying the fraud provisions to deny payment on those items. *See* DA Pam. 27-162, para. 2-45.

The claims examiner must annotate the chronology sheets to reflect the basis for adjusting depreciation because of uncertain purchase dates. Additionally, the examiner must fully inform the claimant of the reason for the action taken. CPT Ward and Ms. Zink.

Poor Repairs Provided by Repair Firms

USARCS has received several inquiries involving instances in which the repair firm that a claimant used provided inadequate repairs or damaged an item further in attempting to repair it.

A claimant is entitled to the fair repair cost of damage incurred incident to service. A claimant is not entitled to any additional amount to cover inadequate repairs by the firm he or she chose to use, even if the claims office listed the repair firm on a claims instruction packet. Additional repair costs occasioned by inadequate repairs are consequential damages and are not compensable under the Personnel Claims Act. Similarly, a claimant is not entitled to payment for loss of, or additional damage to, an item while it is in the repair firm's possession. If, for example, a bicycle damaged in shipment was stolen from the repair shop, the claims judge advocate would compensate the claimant for the cost of repairs, not for the value of the bicycle.

A claimant alleging inadequate repairs is entitled only to additional compensation if he or she can demonstrate that the original estimate of repairs understated the true cost of repairing the item—for example, by failing to include the cost of repairing certain hidden damages. In determining whether any additional payment is appropriate, claims personnel should contact the repair firm and may direct the claimant to obtain another estimate. An approval or settlement authority may allow additional compensation only if evidence substantiates that the original allowance was insufficient to repair the original, shipment-related damage to the item.

For this reason, the current list of repair firms that claims offices are required to provide to claimants, *see* DA Pam 27-162, para. 2-55a(4), must state that listing a repair firm does *not* provide any warranty or guarantee of the quality of service rendered by that firm. Claims offices should, of course, remove from these lists firms that consistently provide inadequate repairs. When a claimant is dissatisfied with the quality of repairs provided by a repair firm, he or she may have legal recourse against that firm. Claims personnel should advise those claimants to consult a legal assistance attorney in these instances.

Finally, rather than file a claim, a claimant initially may choose to use a repair firm selected by a carrier. In some instances, these firms provide inadequate repairs. When a repair firm selected by a carrier provides repairs that the claims judge advocate determines are inadequate, claims personnel should advise the carrier of this and inform the carrier that it will be fully liable for the damages until and unless the carrier's repair firm makes adequate repairs. Captain Ward and Mr. Frezza.

Proper Investigation of Requests for Waiver of Maximum Allowances

USARCS continues to receive too many personnel claim files involving a request by a claimant for waiver of a maximum allowance that have not been investigated adequately.

USARCS will grant a waiver only to correct a bona fide injustice to a claimant. Paragraph 2-35*b* of DA Pam 27-162 lists four specific situations in which a waiver *may* be appropriate, including substantiated misinformation concerning the coverage of the statute from a government employee. As an example, a waiver may be appropriate if a soldier was given incorrect information by transportation personnel during the outbound briefing and, as a result, the soldier dropped or failed to obtain insurance coverage.

When a claimant requests a waiver, the field office must accept the request and conduct an investigation to resolve any issues raised by the claimant. The field office must tailor each personnel claims memorandum to address these issues specifically. *See* DA Pam 27-162, para. 2-35*b*.

When the claimant alleges inadequate transportation counseling, field claims personnel must question the claimant to determine what the claimant allegedly was told, whether the claimant was given the "It's Your Move" booklet or viewed the "It's Your Claim" video, and whether the claimant relied on the alleged incorrect guidance. In some circumstances, to investigate the claim properly, the claims office must contact the outbound transportation office to determine whether the claimant's allegations can be substantiated.

All claims offices periodically should review the information that their transportation offices routinely disseminate concerning the coverage of the Personnel Claims Act. Captain Ward.

Using Orion Blue Books

The normal amount allowable for a missing or destroyed item is the depreciated replacement cost of the same or a similar item. Because computer, camera, audio, and stereo equipment rapidly become obsolete, the "same" item often is unavailable and claims personnel often have difficulty determining what constitutes a "similar" item.

When the replacement cost for the same or a similar item is not available, claims personnel may use the *Orion Blue Books* to price computer, camera, stereo, audio, musical, and office equipment. Claims personnel, however, should use the *Orion Blue Books* only as a guide.

The *Orion Blue Books* are published annually based on information from national surveys and a national board of advisors, and provide average retail prices for both new and used equipment. For example, for a stereo receiver of a particular make and model, the *Audio Blue Book* can provide the range of retail prices for a new item, the fair market value for a used item, and the years the item was manufactured.

By using the appropriate *Orion Blue Book*, the claims examiner either can allow the value given for a used item or can depreciate the median purchase price for a new item. The examiner also can use the *Orion Blue Book* to check a replacement estimate that appears to cover an item of better quality than the one owned.

Orion Research Corporation publishes the *Orion Blue Books* in hardbound editions and on computer diskettes. Claims offices may purchase them using the following address: Orion Research Corporation, 1315 Main Avenue, Suite 230, Durango, Colorado 81301. The telephone numbers for the company are: toll free (800) 748-1984 or commercial (303) 247-8855. Orion publishes separate editions for each type of equipment—such as audio, video and television, and car stereos—with costs ranging from $39.95 to $149 for each volume. Discounts for preferred customers are available.

Claims personnel with a demonstrated need for one or more volumes of the series should contact their office librarian and attempt to order the *Orion Blue Books*. As an alternative to purchasing them, claims offices that have established good working relationships with major dealers in these types of equipment should ask them to provide the book value for a particular make and model. Ms. Holderness and Captain Ward.

Personnel Claims Recovery Note

Proper Substantiation for Household Goods Claims

As a condition for payment and to facilitate carrier recovery, the Personnel Claims Act requires claims to be

substantiated. *See* 31 U.S.C. § 3721(f)(1) (1988). Paragraph 2-41 of DA Pam 27-162 states that as a rule of thumb, claims personnel should require claimants to provide a purchase receipt, a replacement estimate, or an estimate of repair for any item valued at $100 or more.

The Recovery Branch, USARCS, is encountering too many claims in which the required substantiation is lacking completely. Carriers who fail to receive estimates with the demand packet continually make inadequate offers, claiming that no proof of value was provided for the items claimed. This leads to a protracted exchange of letters, an offset action, and ultimately a time-consuming and unnecessary appeal by the carrier to the General Accounting Office.

In a recent example, a claimant was paid fair and reasonable amounts of $150 to $250 for three large rugs missing in shipment. The claims office failed to request replacement estimates. When the carrier was informed that estimates were not available, it maintained that its offer of $50 each for two of the rugs and $75 for the third was reasonable. Correct carrier liability was collected through offset action. The carrier protested this offset action and has continued the process by appealing to the General Accounting Office.

In another instance, a claimant was paid $675 for a destroyed waterbed without a replacement estimate. The adjudicator's remarks on the DD Form 1844 merely stated that the item was paid "AC"—that is, as claimed. Because the demand packet failed to contain anything establishing the item's value, the carrier offered fifty percent of the amount paid as a "good will gesture." This offer was rejected and the carrier was offset for the full liability. The carrier has since appealed to the General Accounting Office.

In both of these cases, a detailed replacement estimate or similar evidence of value would have eliminated a great deal of unnecessary labor and would have resulted in quicker recovery for the government. If, in a rare case, the claimant insists that he or she cannot provide a repair or replacement estimate, the claims examiner must explain in detail on the claims chronology sheet the reasoning underlying the actual amount paid. Ms. Schultz.

Office Management Note

Electronic Payment Procedures Eliminate Unnecessary Paperwork

Some installation Finance and Accounting Offices (F&AO) that receive claims payment vouchers via electronic certification (STANFINS, Redesign) are requesting that claims offices also submit DD Forms 1842, paper vouchers, and other backup documentation. This is contrary to United States Army Finance and Accounting Center policy. It also wastes government resources.

Pursuant to paragraph 2-24*a.1* of AR 27-20 (*Electronic payment procedures*), the only documentation that claims offices are authorized to provide to the F&AO is a signed copy of the "payment report" produced by the appropriate automated claims management program. The report can be printed by using "ALT-P" while editing the claims record. This report also may be matched with a print screen from the STANFINS, Redesign, payment data screen to assist the local F&AO in issuing the United States Treasury check. The claims office must retain all other documents, but can make them available for the F&AO's inspection.

We further understand that some claims offices using STANFINS, Redesign, do not have access to "data query." The data query function allows the claims office to obtain automated reports on claims payments and refund deposits. USARCS requests heads of claims offices to ensure that this function is available to their claims personnel. The local F&AO STANFINS, Redesign, system administrator can provide instruction in using data query. Mr. Frezza.

Management Note

Termination of Claims Processing Offices with Approval Authority

Sharpe Army Depot, California (office code 032) has come under the jurisdiction of the Defense Logistics Agency (DLA) and been redesignated as Defense Distribution Region West-Sharpe Site (DDRW-Sharpe). Because of this realignment, DDRW-Sharpe no longer will adjudicate or pay claims. Accordingly, the authority for DDRW-Sharpe to act as a claims processing office with approval authority has been terminated effective 1 January 1991.

On 31 December 1990, the Boeblingen Claims Office (office code E62), 1st Infantry Division (Forward), ceased its claims operations. Accordingly, the authority for Boeblingen to act as a claims processing office with approval authority has been terminated effective 1 January 1991. Although the office, under VII Corps, will continue to provide other legal services to the Boeblingen community, it will no longer accept or process claims. Claimants now should file their claims at one of the claims offices near Boeblingen, such as Patch or Robinson Barracks (VII Corps) in Stuttgart. Lieutenant Colonel Thomson.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Equal Employment Opportunity Law

Interest on Back Pay

As we discussed in the May 1990 issue of *The Army Lawyer*, the Department of Justice Office of Legal Counsel had opined that agencies could not award interest on back pay remedies provided pursuant to title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. We also told you that the Equal Employment Opportunity Commission (EEOC) had taken an opposing position, suggesting that it always had authority under title VII to award interest. The EEOC explained, however, that it could not award prejudgment interest before the 1987 amendments to the Back Pay Act because of the government's general immunity from paying interest and the lack of an express waiver of that immunity. The Back Pay Act amendments constituted a broad waiver of immunity for any agency to award interest on back pay found to be due under any applicable law, rule, or regulation. *See* 5 U.S.C.A. § 5596 (West Supp. 1990).

In *Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990), the Court of Appeals for the District of Columbia rejected the government's claim that the Back Pay Act's waiver of sovereign immunity does not authorize prejudgment interest on back pay awards to successful discrimination claimants in the federal sector. In dicta, the court stated that the Back Pay Act and title VII "are most sensibly read as complementary" and that the former waives the government's sovereign immunity with respect to prejudgment interest on back pay awards under the latter.

On the facts of this particular case, however, the employees involved did *not* receive interest because, while they may have suffered a discriminatory denial of promotion, nonselection for a higher graded position did not amount to a "withdrawal or reduction of all or part of [their] compensation" under the Back Pay Act. While the waiver of governmental immunity in the Back Pay Act "complements" title VII and the Age Discrimination in Employment Act, an employee still must meet the requirements of the Back Pay Act to be entitled to prejudgment interest. The OTJAG Labor and Employment Law Office will keep you posted of any developments. In the interim, installations should not pay interest on awards for equal employment opportunity complaints.

Frivolous Suit Sanctions Not Barred by Prima Facie Case

In *Blue v. Department of the Army*, 914 F.2d 525 (4th Cir. 1990), the court affirmed the imposition of sanctions against two Army employees and their counsel. The Fort Bragg case initially was filed as a class-action suit in September 1981 and alleged discrimination by hundreds of soldiers and civilian employees in hiring, promoting, assigning jobs, and other aspects of employment. Discovery was massive in this case with an estimated five million documents produced. By 1986, only two plaintiffs maintained their claims. On December 28, 1987, Judge James C. Fox imposed $84,000 in sanctions against the employees and their attorneys.

While substantially lowering the dollar amount of sanctions, the Fourth Circuit rejected the appellants' claims that their ability to raise a prima facie case insulated them from liability for sanctions. The court cited *Christianburg Garment Company v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), wherein the Supreme Court stated that sanctions can be imposed for cases brought or continued in bad faith. In the instant case, Judge Fox found the suits totally baseless and categorized them as "racial McCarthyism" in that the plaintiffs were accusing government officials of discrimination merely because they were not promoted or because they received performance appraisals not to their liking.

Labor Law

ULP Pre-Charge Settlement Requirements

The Federal Labor Relations Authority (FLRA or Authority) General Counsel advised her regional office to issue a complaint alleging violation of 5 U.S.C. sections 7116(a)(1) and (2) for an employer's refusal to hire an individual, despite the union's having ignored the contractual procedure requiring pre-charge notice to the other party and settlement attempts prior to filing a charge with the FLRA. The General Counsel acknowledged that she normally would dismiss a charge for failure to follow a contractual pre-charge procedure. In this case, however, the individual employee, who was not bound by the settlement procedure, could have filed the charge directly with the FLRA. Requiring the employee to follow the pre-charge procedure would render the charge untimely. The General Counsel concluded that the purposes of the statute would not be served by failure to accept the charge. *Department of Defense, Dependents Schools, Germany Region and the Butzbach Elementary School*, G.C. No. 1-CA-90215 (Mar. 31, 1990), 90 FLRR 1-3031.

Arbitrator Orders Management to Provide Training

The FLRA rejected agency exceptions to an arbitration award in which the arbitrator had ordered the agency to provide biweekly training to employees detailed to guard

detained aliens. When management had assigned deportation officers to duties as guards with minimal training for the potentially hazardous work, the union grieved. The arbitrator interpreted a contract provision that required management to provide "reasonable training" for employees performing duties "involving special hazards" as obligating management to provide the training. The union had not argued that the arbitrator merely was enforcing a negotiated appropriate arrangement. Nevertheless, the FLRA analyzed the arbitrator's award using its new test, first set out in *United States Customs Service*, 37 FLRA 309 (1990), to determine whether an award enforcing an agreement provision is contrary to management's rights. The FLRA will uphold the award if the provision is an arrangement for employees adversely affected by the exercise of management's rights and does not *abrogate*—rather than excessively interfere with—the exercise of that right. The FLRA concluded that the provision was an "arrangement" without providing a rationale. It then reasoned that the award enforcing the provision in question did not abrogate management's right to assign work—that is, training—because the award merely enforced a provision agreed upon by the parties. It deferred to the arbitrator's finding that the minimal training provided by the agency was short of the "reasonable training" required by the collective bargaining agreement (CBA). *Department of Justice, Immigration and Naturalization Serv. and AFGE*, 37 FLRA 639 (1990).

Arbitral Order of Promotion to Nonexistent Position

In continuing to apply its opinion in *United States Customs Service*, 37 FLRA 309 (1990), which upheld arbitrators' enforcing appropriate arrangements that do not abrogate the exercise of management's rights, the FLRA also decided an issue of first impression. The agency had excepted to the arbitrator's order that it promote a grievant prospectively without regard to whether a vacant position at that grade existed. The arbitrator had interpreted a contract provision defining priority consideration. He had read the seemingly innocuous language to require management to select an employee entitled to priority consideration because of an earlier denial of proper consideration. The FLRA decided that the award did not abrogate the exercise of management's right to select. It reasoned that the contract language required management to select employees meeting management-established minimum qualifications and, therefore, did not abrogate the exercise of the right to select. The FLRA did, however, agree with the agency that the award was deficient because it required the agency to create a position. By impinging on management's right to determine its staffing patterns, the award interfered with 5 U.S.C. section 7106(b)(1). The FLRA will enforce such an award in the future only if the arbitrator is applying an applicable agreement by the parties specifically on that matter. No agreement existed in the instant case, but the FLRA modified the award to require management to promote the grievant to the next available position, with back pay if appropriate. *United States Dep't of Health and Human Servs., Social Sec. Admin., Kansas City and AFGE*, 37 FLRA 816 (1990).

Release of Crediting Plans

On remand from the Fourth Circuit, the FLRA considered the merits of an unfair labor practice complaint. The agency had refused to comply with an order from a Federal Service Impasses Panel (FSIP) arbitrator to incorporate agreement language requiring the agency to publish portions of crediting plans in vacancy announcements. Specifically, the agency alleged that the order was inconsistent with provisions in Federal Personnel Manual (FPM) Supplement 335-1, requiring agencies to maintain confidentiality of crediting plans if release would provide unfair advantage to some applicants. The FLRA had ruled that an agency may challenge the order of an interest arbitrator only by filing exceptions under 5 U.S.C. section 7122, and ordered the agency to comply. The court of appeals had vacated the FLRA order, ruling that an order of an FSIP-approved arbitrator effectively is an order of the panel subject to negotiability appeal procedures, to include unfair labor practice (ULP) proceedings. On remand, the FLRA considered the agency's contentions. First, the FLRA distinguished earlier opinions allowing release of crediting plans, under 5 U.S.C. section 7114(b)(4), to unions deciding whether to grieve virtually completed selection actions. The FLRA then observed that allowing bargaining unit employees to tailor their applications to the crediting plans would give them an unfair advantage over individuals referred on Office of Personnel Management (OPM) registers and over voluntary applicants without access to the vacancy announcements. Because the arbitrator's order was inconsistent with a government-wide regulation, the agency had no duty to comply. Accordingly, the FLRA affirmed the administrative law judge's dismissal of the complaint. *Defense Logistics Agency, Defense General Supply Center, Richmond and AFGE*, 37 FLRA 895 (1990).

Smoking Policy Revisited

The FLRA concluded that an Indian Health Service hospital's proposed policy of making its facility smoke-free involved the methods and means of performing its mission. When the hospital refused to bargain over its proposed implementation of the policy, the union filed an unfair labor practice charge. The FLRA reasoned that the smoking policy was a "method" covered by 5 U.S.C. section 7106(b)(1) because it involved a determination on how management would provide health care; and, as a policy adopted by the agency to accomplish its health-care mission, it also constituted a "means." The FLRA noted that management's right to set a policy of a smoke-free environment, however, "does not encompass the

right to institute a total ban on smoking." It still must bargain on proposals that do not interfere directly with the purposes of the smoking policy. Because management had foreclosed all bargaining on the new policy, it violated 5 U.S.C. sections 7116(a)(1) and (5). *United States Dep't of Health and Human Servs., Public Health Serv., Indian Health Serv., Indian Hosp., Rapid City, S.D. and NFFE*, 37 FLRA 972 (1990).

Performance Awards

The FLRA considered a negotiability appeal covering a union proposal that would specify minimum and maximum performance awards for each level of performance rating as percentages of base salary. The FLRA rejected the agency arguments that the provision did not constitute a condition of employment and that it interfered with its right to determine its budget. The FLRA did, however, accept the argument that the language was inconsistent with government-wide regulation. Section 430.503(c)(1), title 5 of the Code of Federal Regulations, requires that performance award determinations be approved by an agency official at a level higher than that of the official making the initial determination. The FLRA opined that the "expressed authority to review and approve inherently encompassed the authority to review and disapprove." Because the union proposal effectively would require the reviewing official to approve the awards, it was contrary to the regulation. The FLRA never considered whether the regulation involved the exercise of agency discretion—a matter traditionally subject to bargaining. *Tidewater Va. Fed. Employees Metal Trades Council and Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 37 FLRA 938 (1990).

Releasibility of Performance Appraisals

The FLRA affirmed an arbitrator's ruling that sustained a grievance challenging management's refusal to provide certain portions of employee performance appraisals. The union had requested the portions of unit employees' appraisals describing the nature of the work performed, including specific case names worked. The National Labor Relations Board (NLRB) had argued that disclosure under 5 U.S.C. section 7114(b)(4) was "prohibited by law" because the Privacy Act precluded unconsented disclosure of records resulting in an unwarranted invasion of personal privacy. The arbitrator and the FLRA agreed that the public interest to be balanced against the employees' privacy interest is the union's interest in performing its representational functions. Because the union's interest prevailed over the employees' privacy interest, the appraisals had to be released. The FLRA, however, cautioned that blanket disclosures of appraisals still may be precluded; its holding in this case concerned only the specific information in the appraisals requested by the union. *National Labor Relations Bd., Office of the Gen. Counsel and NLRB Union*, 37 FLRA 1036 (1990).

Government-Wide Regulation Overrides Renewed Agreement

In reviewing exceptions to an arbitration award concerning performance appraisal procedures, the FLRA interpreted the effect of 5 U.S.C. section 7116(a)(7) on automatic contract renewals. At issue was whether the award was in conflict with 5 C.F.R. section 430.206(c), which requires higher-level approval of an appraisal before its communication to the employee. The local agreement required communication of the rating to the employee before submission to a higher level for review. OPM had issued the regulation after the local agreement's initial term but during an automatic one-year renewal term. The FLRA addressed the question of whether provisions of a renewed CBA override government-wide regulations in effect at the time of the renewal. It concluded that policies of the statute are served best by a narrow interpretation of 5 U.S.C. section 7116(a)(7) and that the government-wide regulation prevails over a contrary provision in an agreement beyond its initial term. *Defense Contract Audit Agency, Cent. Region and AFGE*, 37 FLRA 1218 (1990).

Memory-Joggers Available to Union

The FLRA affirmed a ruling by an administrative judge (AJ) that the union was entitled under 5 U.S.C. section 7114(b)(4) to "memory joggers," which management had created to memorialize an incident that had become the subject of a grievance. At an awards ceremony, a bargaining unit employee had told the supervisor conducting the ceremony that he wanted the money, but not the award. The supervisor, therefore, did not present the award check. He subsequently requested that the subordinate supervisors attending the ceremony provide him with notes setting forth their versions of what happened. He then concluded that the employee had refused to accept the award and returned the check to the United States Treasury as undeliverable. Pursuing the resulting grievance by the unit employee, the union sought the notes, which the supervisor characterized as "memory joggers," to learn the basis for management's action and to assist in its ability to discuss settlement options. Management argued that because the notes were not in a "system of records" as defined by the Privacy Act, they were not available under 5 U.S.C. section 7114(b)(4). The Authority rejected that position, finding that the term "data" in section 7114 has no connection with the term "record" in the Privacy Act. Because the memory joggers were "normally maintained by the agency in the regular course of business," and their release was not prohibited by law, they were available to the union. *Department of HHS, Social Sec. Admin., Baltimore and Social Sec. Admin., New Bedford Dist. Office, New Bedford, Mass. and AFGE*, 37 FLRA 1277 (1990).

Interest Arbitration Subject to Agency Head Review; Unsanitized Disciplinary Actions Not Available to Union

In an unfair labor practice proceeding arising from attempts by the Immigration and Naturalization Service (INS) and the Association of Federal Government Employees (AFGE) to negotiate a bargaining agreement, the FLRA effectively overruled some earlier positions. The parties had participated in "mediation-arbitration" directed by the FSIP after the union had sought the FSIP's assistance. When the Department of Justice (DOJ) disapproved portions of the agreement imposed by the arbitrator, the union charged that the INS lacked authority under 5 U.S.C. section 7114 to review an agreement imposed by a FSIP-approved arbitrator. It also charged that management had violated its duty to bargain by disapproving a negotiable provision.

The FLRA first reaffirmed the power of the FSIP to direct parties to interest arbitration by an outside arbitrator, despite INS arguments that the FSIP lacked authority to direct agencies to spend money for services that the FSIP should provide without charge. The Authority adopted for future cases several courts of appeals decisions that overruled the previous FLRA position that awards issued pursuant to FSIP-directed interest arbitration are subject to challenge only by exceptions filed pursuant to section 7122—not by agency-head review under section 7114. Henceforth, the FLRA will recognize the right of an agency head to review agreement provisions imposed by an interest arbitrator appointed under section 7119(b)(1). It declined to address the question of whether that authority extends to provisions imposed by interest arbitrators whom the parties had retained under section 7119(b)(2).

The FLRA noted that two courts of appeals have suggested that challenges to interest arbitration awards made after the FSIP's approval of a joint request under section 7119(b)(2) may be made only by exceptions filed under section 7122. Therefore, labor counselors—in addition to submitting the language for review under section 7114—should ensure that management timely files exceptions to language that is imposed in a section 7119(b)(2) scenario and that appears to violate statute or regulation.

The FLRA also reaffirmed its position that challenges to agency head disapprovals of agreement language may be made either through the negotiability appeal or unfair labor practice procedures. Having resolved the procedural issues, the Authority analyzed the merits of the dispute over the negotiability of a provision that would require the agency to provide the union unsanitized copies of letters of proposal and decision in disciplinary actions against unit employees when the employee had not chosen union representation. The FLRA distinguished its decision in *National Treasury Employees Union*, 32 FLRA 62 (1988), in which it found that the union's interest in disclosing information related to disciplinary actions against unit employees outweighed the employees' privacy interests. The FLRA ruled that, to the extent that its earlier decision meant that the union always is entitled to unsanitized disciplinary records, it will no longer adhere to it. The Authority found that, in the facts and circumstances of the instant case, the employees' privacy interests were paramount. The Privacy Act, therefore, barred disclosure under section 7114(b)(4). Because the disputed language was nonnegotiable, the agency was within its authority to disapprove it. *Department of Justice and INS and AFGE*, 37 FLRA 1346 (1990).

Notice of Drug Testing Is Nonnegotiable

The FLRA continued to find that union proposals addressing random drug testing interfere with management's right to determine its internal security practices. The language in question required the agency to give employees certain information, such as the testing interval and location of drug counseling services, at least two hours prior to conducting a drug test. The Authority found that even this relatively short advance notice interfered with the agency's ability to conduct unannounced random drug tests of employees in sensitive positions. *AFGE and Sierra Army Depot, Herlong, Cal.*, 37 FLRA 1439 (1990).

Arbitrators' Bench Decisions Not Final and Binding

Labor counselors in need of some fascinating reading should check the decision in *Small Business Administration, Washington and AFGE*, 38 FLRA 386 (1990), to see how outlandish federal service labor-management relations can become. Dean Stanton was the deputy director of a Small Business Administration (SBA) office and was under notice of proposed removal. He signed a "settlement agreement" with the local union, settling several outstanding grievances. The terms of the agreement included payment of $6.7 million to the local for "overhead and operating expenses," a statement that the SBA "is a racketeer influenced and corrupt organization in desperate need of rehabilitation," 100 percent official time for thirty-five union representatives, individual relief for several named employees, promotion of the union president from GS-13 to GS-15, recision of Stanton's removal, payment of Stanton's attorneys' fees, and designation of an arbitrator to enforce the agreement.

After the SBA Acting Administrator repudiated the agreement, the union invoked arbitration. The SBA refused to participate in the arbitration hearing, arguing that Stanton lacked authority to enter the settlement and that the agreement was void. In an oral bench decision, the arbitrator upheld the settlement. The SBA then removed Stanton after reissuing the proposal with added charges of insubordination and conflict of interest that flowed from Stanton's role in the settlement agreement. The Merit Systems Protection Board (MSPB or Board) sustained the removal. Meanwhile, the arbitrator issued a written "Clarification of Bench Decision and Supplemen-

tal Award," to which the SBA timely filed exceptions. The union argued that the exceptions were untimely—a compelling argument under the then-existing FLRA case law that required that exceptions to oral bench decisions be filed within thirty days.

Faced with an absurd award with timely exceptions only to the so-called clarification, but not to the enforcement of the settlement agreement, the Authority reversed its prior cases on oral bench decisions. It held that the thirty-day period for filing exceptions does not run until a *written* award is served on the parties. It did caution that arbitrators need not write opinions to accompany their awards. A transcription of the award itself is sufficient, even if handwritten. The FLRA took judicial notice of, and accepted, the MSPB AJ's findings that Stanton lacked authority to enter the settlement agreement. The agreement, therefore, was void and unenforceable. Because the arbitrator lacked authority to issue an award, the FLRA set it aside.

CBA Time Sensitive to Imposition of Discipline

The FLRA upheld an arbitrator's enforcement of a CBA provision that required that "[d]isciplinary actions will be initiated within 15 working days after the incident except where precluded by extenuating circumstances." The agency had suspended the grievant for "creating a disturbance and damaging the efficiency of the work unit." The arbitrator rejected management's argument that the initial contact between grievant's supervisor and the personnel office on the matter constituted "initiation" of the action. She held that the action was not initiated for purposes of that article until the letter of proposed suspension was issued to grievant—an event occurring beyond the fifteen-day limit. Accordingly, she overturned the suspension and awarded attorney fees.

In its exceptions, the agency argued that the arbitrator had enforced an invalid agreement provision that contravened management's right to discipline. The Authority again applied its holding in *Customs Service*, 37 FLRA 309 (1990), in evaluating the argument. When the agreement provision evidently is an "arrangement" for employees adversely affected by the exercise of a management right, the FLRA will deny the exception unless the arbitrator's interpretation abrogates the exercise of management's rights. It reasoned that the arbitrator's interpretation still permitted management to take disciplinary action within the fifteen-day period and in situations in which extenuating circumstances exist. The FLRA therefore found that the award did not abrogate the exercise of management's rights and it denied the exception. The Authority did, however, strike the award of attorneys' fees because the arbitrator did not provide the required "fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement." *Department of the Army, Army Transp. Cent., Fort Eustis and NAGE*, 38 FLRA 186 (1990).

Last Chance Agreements

The FLRA ruled on a number of union proposals concerning the Air Force's use of last chance settlement agreements in exchange for management withdrawal of disciplinary or adverse actions. One proposal would prevent the agency from attempting to persuade employees to waive future appeal or grievance rights, which is the normal *sine qua non* of these agreements. In *AFGE and Department of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 38 FLRA 309 (1990), the Authority found the language to be a negotiable procedure. The requirement did not affect management's right to impose discipline or to determine whether to enter a last chance agreement.

Highlights of the decision show that language required in the agreements is negotiable. The required negotiable language included reinstatement of appeal rights if the disciplinary action is reinstated, that last chance agreements will be implemented only for just cause, that the probationary period under the agreements will not exceed one year, and that signing the agreement does not constitute an admission of wrongdoing by the employee. Certain other proposed required language, however, was nonnegotiable. Language staying implementation of last chance agreements until final decision on a grievance filed under the grievance procedure ran afoul of management's right to curtail the notice period when invoking the "crime provision." The requirement to expunge from an employee's records the actions leading to a last chance agreement interfered with management's right to discipline because it limited the agency's ability to consider prior misconduct. The Authority also disapproved a provision permitting employees to challenge the agreements under the negotiated grievance procedure. Some last chance agreements could be entered into the record in conjunction with an MSPB appeal; they thereby could be placed under Board jurisdiction. Permitting a grievance on a matter under MSPB jurisdiction is contrary to 5 U.S.C. section 7121. Requiring union presence at the discussion of a last chance agreement with an employee does not violate the Privacy Act and is within the duty to bargain. Allowing the union to negotiate on behalf of the employee at these meetings, however, violates the employee's rights to choose his own representative in MSPB appeals and to represent himself under the negotiated grievance procedure.

Arbitration Awards and Army Regulations

Historically, the most successful exception to an arbitration award that is adverse to management is that the award is "contrary to any law, rule or regulation" under 5 U.S.C. section 7122(a)(1). Previously, this provision has been thought to apply to only government-wide regulations, such as Office of Management and Budget Circular A-76. The FLRA has now determined, however, that for the purposes of section 7122(a)(1) of the statute,

the term "rule or regulation" includes agency rules and regulations.

In *Fort Campbell and AFGE Local 2022*, 37 FLRA 186 (1990), the Authority set aside an arbitration award that directed the Army to reimburse temporary duty (TDY) money that was recouped because of the employee's fraud. The arbitrator in this case had misinterpreted the Joint Travel Regulation (JTR). The Authority will now find an arbitration award deficient when the award is contrary to an agency rule or regulation, unless the award enforces a conflicting provision of an applicable collective bargaining agreement. We look forward to future developments in this area. Note, however, that the award in this case involved the JTR—a Department of Defense (DOD) regulation. "Agency" is defined in 5 U.S.C. section 7103(a)(3) as an executive agency, which is defined further in 5 U.S.C. sections 101 and 103 as including the Department of Defense. Therefore, when charging an employee for violating an Army regulation, also charge a violation of the underlying DOD directive, if one exists.

Civilian Personnel Law

False Testimony Actionable

The MSPB sustained a charge against an employee for lying when the employee was denying separately charged misconduct. In *Kane v. Department of Veterans' Affairs*, 46 M.S.P.R. 203 (1990), the agency removed the appellant for falsifying the signature of another employee on a grievance form and for lying when she denied the misconduct both during the agency investigation and while under oath at an arbitration hearing. The Board distinguished *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), in which the court had ruled that an agency may not charge an employee with misconduct *and* false statements for denying that misconduct. *See* Labor and Employment Law Note, *Employee Denial of Misconduct*, The Army Lawyer, June 1990, at 76. The court followed *Greer v. United States Postal Service*, 43 M.S.P.R. 180 (1990), in which the charged misconduct had occurred off-duty and was not a matter of official interest to the Postal Service. The Board agreed with the AJ that the agency had failed to prove the charge that appellant falsified the signature with the intent to deceive the agency. It did, however, sustain the charges of lying under oath during the investigation and of having forged the signature. Accordingly, it reduced the penalty to a ninety-day suspension.

Multiplicious Charges Useful

Kane should be read in conjunction with *Burroughs v. Department of the Army*, 918 F.2d 170 (Fed. Cir. 1990). In *Burroughs* the employee was removed for: (1) directing the unauthorized use of government materials, manpower, and equipment for other than official purposes; (2) failure to follow proper procedures for man-hour and workload accounting in violation of policy and Army directives; and (3) lying to his supervisor. On appeal, the AJ "determined that Burroughs acted without proper authorization," but that "Burroughs was indeed acting for an official purpose." Accordingly, the first charge was sustained in part. The AJ, however, did not sustain charges 2 and 3, and reduced the penalty from removal to a fourteen-day suspension. The Board affirmed. The Federal Circuit determined that the "Administrative Judge erred in not requiring *each* of the elements of the first charge to be proved." (emphasis in original). Accordingly, the court reversed the penalty as a matter of law because the agency had proven only part of one charge.

Kane and *Burroughs* highlight the need for labor counselors to be involved intimately at the proposal stage and to be involved in putting on the agency's case in chief before the AJ. Labor counselors should break down each charge into its elements, make sure that every element of each charge is covered, and be prepared to put on proof of every element of the charges at hearing. Subsequently, labor counselors should summarize the evidence on each charge in a closing argument so that the AJ will have an effective record upon which to base the decision. Note these cases to the Management and Employee Relations Division of your local Civilian Personnel Office and remind them that every step of the process is important.

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes advise attorneys of current developments in the area of environmental law and of changes in the Army's environmental policies. OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage practitioners to submit articles and notes from the field for this portion of *The Army Lawyer*. Authors should submit articles to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Legislative Activity in the 101st Congress

1990 Clean Air Act Amendments

The new Clean Air Act (CAA) Amendments[1] were signed into law by President Bush on November 15, 1990. This is the first significant revision of the CAA in thirteen years. It strengthens and broadens the CAA by setting specific goals and timetables for reducing urban smog, airborne toxins, acid rain, and stratospheric ozone depletion. Unlike other statutes of this magnitude, the legislative history accompanying the CAA includes only a staff-prepared conference committee report, rather than a formal conference report receiving full approval of the conference committee. This abbreviated "statement of the managers" was inserted into the *Congressional Record*.[2] Controversy has developed because some House members did not agree that "the statement" reflected the thinking of all conferees. This disputed legislative history may figure prominently in future litigation involving the CAA.

One of the new amendments to the CAA is of special importance to Army attorneys. Section 118[3] now waives the Federal Government's sovereign immunity for the payment of all fees and charges used to defray the cost of a state's air pollution regulatory program. This language substantially modifies the "benefits" analysis under *Massachusetts v. United States*[4] because states now will be able to collect fees even if no benefits are received by the installation.

RCRA Reauthorization

Legislation to reauthorize the Resource Conservation and Recovery Act (RCRA)[5] did not move beyond the subcommittee level during the 101st Congress. The new Clean Air Act Amendments reportedly were responsible for the inaction. Because the current authorization for RCRA expires during 1991, this legislation will be one of the first issues confronting the 102nd Congress.

Superfund Reauthorization

As part of the 1991 budget package,[6] Congress extended the funding for the Superfund[7] program for four years by extending the Superfund tax. The authorization for operation of the fund also was extended by separate language, but only for three years. Congress authorized funding for Superfund at the same level that appears in the current authorization. Unlike the first Superfund reauthorization (SARA),[8] in which the EPA was required to begin a certain number of cleanups every year, the new reauthorization language does not include any targets for 1992 and beyond.

RCRA Cleanup Standards at Federal Facilities

Because of inaction by the Senate, the 101st Congress failed to complete work on legislation making federal facilities subject to stronger enforcement of hazardous waste cleanup standards under the provisions of RCRA.

The House passed H.R. 1056, the Federal Facilities Compliance Act. Among other changes,[9] this bill would have amended the waiver of sovereign immunity in RCRA to allow states to impose administrative and judicial civil sanctions against noncomplying federal agencies.[10] As one state's attorney general said, "[t]he bill [H.R. 1056] ... goes a long way towards ensuring that Federal facilities will be treated in the same manner under RCRA as private facilities...."[11] All fifty states' attorneys general,[12] as well as the Environmental Protection Agency, supported H.R. 1056.[13] Its passage was

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[1] The Clean Air Act Amendments of 1990, Pub. L. No. 101-549 (1990).

[2] S. 1630, 101st Cong., 2d Sess., 136 Cong. Rec. S. 16895 (daily ed. Oct. 27, 1990).

[3] 42 U.S.C. § 7418(a) (1988) (as amended by Pub. L. No. 101-549, § 101(e) (1990)).

[4] Massachusetts v. United States, 435 U.S. 444 (1978).

[5] 42 U.S.C. §§ 6901-6992k (1988).

[6] Pub. L. No. 101-584 (1990).

[7] The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 (1988).

[8] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[9] H.R. 1056 also would have broadened significantly EPA's ability to enforce RCRA against other federal agencies.

[10] The original version of the bill also subjected federal agencies to criminal sanctions. The Department of Justice (DOJ) noted that a waiver subjecting federal agencies to state criminal prosecutions not only was unprecedented, but also was unnecessary. Individual federal employees already were subject to criminal prosecution under RCRA and agencies were subject to suits for injunctive relief. Moreover, criminal liability was unworkable because imprisoning a federal agency is obviously impossible. *See Hearings on H.R. 1056 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 115-116 (1989) [hereinafter *Hearings on H.R. 1056*] (statement of DOJ's Donald Carr, Acting Assistant Attorney General, Lands and Natural Resources Division).

[11] *Id.* at 46 (statement of Colorado Attorney General Duanne Woodard).

[12] *See* 135 Cong. Rec. H3895 (daily ed. July 19, 1989).

[13] EPA's support was gained after the bill had been amended to make it clear that federal employees could not be held individually liable for civil fines and penalties under RCRA. *See id.* at H3894. Originally, EPA had *officially* opposed the passage of H.R. 1056. That opposition, however, was tepid. In congressional hearings on H.R. 1056, the EPA's Jonathan Z. Cannon, Acting Assistant Administrator, Office of Solid Waste and Emergency Response, testified that while the official position of EPA was to oppose passage, "[t]he position my office has taken in internal discussions within my agency and with other Federal agencies is that H.R. 1056 would offer useful provisions to improve or to encourage compliance on the part of Federal Facilities under RCRA." *Hearings on H.R. 1056, supra* note 10, at 130.

opposed by the Department of Justice (DOJ), the Department of Defense (DOD), and the Department of Energy (DOE).[14] Ultimately, however, H.R. 1056 was passed by the House on July 19, 1989, by a vote of 380 to 39.[15]

Senate Majority Leader George Mitchell introduced S. 1140 as companion legislation to H.R. 1056 on May 31, 1989.[16] The Bush Administration, led by DOD and DOE, opposed the legislation, arguing that it would allow states to usurp federal authority to set priorities for cleanup of hazardous waste sites. Like H.R. 1056, S. 1140 would have allowed states to take enforcement actions and impose fines against federal facilities for violations of state hazardous and solid waste regulations. Ultimately, however, S. 1140 did not make it out of committee in time for a vote on the floor of the Senate.

Legislation patterned after H.R. 1056 or S. 1140 likely will be reintroduced in 1991, probably as part of the RCRA reauthorization bill. Passage of this legislation could have a tremendous impact on DOD facilities. As one critic noted:

> Ohio Representative Dennis Eckart's bill [H.R. 1056] would waive the federal sovereign immunity clause under the Solid Waste Disposal Act, thereby inviting every legal yahoo and politician in the country to sue the Defense Department for not instantly cleaning up waste sites. Fines and penalties will run into the tens of millions of dollars.[17]

Environmental Initiatives in the DOD Authorization Bill

On 5 November 1990, President Bush signed into law the Strategic Environmental Research and Development Program (SERDP).[18] This program will focus on environmental data gathering and analysis, promotion of environmental compliance and advanced energy technology, and development of environmental cleanup technologies. A SERDP Council will be created to apply the resources of the DOD, DOE, and the intelligence community to solve environmental problems. The EPA will be a voting member of the council.

Also included in the defense package was authorization of $1.06 billion for the Defense Environmental Restoration Account (DERA).[19] The DOD uses DERA to fund hazardous waste cleanups at DOD sites. Another DOD authorization provision establishes a separate fund within the Base Closure Account for environmental restoration at bases selected for closure.[20]

Superfund Bond Liability

Despite EPA's opposition, Congress passed a bill to limit surety bond companies' Superfund liability. The new law[21] states that sureties that provide bonds for cleanup contractors only will be liable for completing the contract. Sureties will not be liable for personal injury or property damage claims. This change is significant because federal law requires that all federal construction contracts be guaranteed by a bond. This bond is supposed to provide the government with an effective recourse in the event of a contractor's default.

Additional Investigators for EPA

President Bush signed into law legislation that will increase the number of civil and criminal investigators for EPA. Under the Pollution Prosecution Act,[22] the number of EPA criminal investigators will increase fourfold, gradually reaching 200 by 1995. The bill immediately adds fifty civil investigators. It also establishes a national training center to educate lawyers, inspectors, and investigators about federal environmental laws.

Bill Applying NEPA Overseas Stalled

The National Environmental Policy Act (NEPA)[23] requires consideration of environmental impacts when deciding whether to proceed with a major federal action. Efforts to require NEPA's application to major federal actions overseas failed during the 101st Congress.

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[14] *Hearings on H.R. 1056, supra* note 10, *passim.*

[15] 135 Cong. Rec. H3895 (daily ed. July 19, 1989).

[16] S. 1140 , 101st Cong. 1st Sess., 135 Cong. Rec. S6330 (daily ed. May 31, 1989).

[17] *A Routine Outrage,* Wall St. J., July 19, 1989, at A-14, col. 1, *reprinted in* 135 Cong. Rec. H3890 (daily ed. July 19, 1989) (statement of Rep. Ray).

[18] Defense Authorization Bill, Pub. L. No. 101-510, § 1801 (1990).

[19] *Id.* at § 1802.

[20] *Id.* at § 2923.

[21] The 1990 Budget Bill, Pub. L. No. 101-508 (1990).

[22] The Pollution Prosecution Act of 1990 (amending Pub. L. No. 98-63 (1989) (Supplemental Appropriations Act of 1989)).

[23] 42 U.S.C. §§ 4321-4370a (1988).

In October 1990, the House passed H.R. 1113, which contained language that would require NEPA's application to major federal actions overseas.[24] The Senate's version, S. 1089, was not placed on the Senate calendar for a floor vote, however, because the bill contained language requiring NEPA's application overseas.

Regulatory Notes

New National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges

On November 16, 1990, the Environmental Protection Agency (EPA) published new National Pollution Discharge Elimination System (NPDES) permit requirements for storm water sewer discharges.[25] The regulations, required by section 402(p) of the Clean Water Act,[26] became effective on December 17, 1990. They are intended to limit the amount of pollutants that are washed into storm water drains and discharged into lakes, streams, and rivers without treatment.

The requirements will affect Army installations having "discharge[s] from any conveyance which is used for collecting and conveying storm water and which is directly[27] related to manufacturing, processing, or raw materials storage at an industrial plant."[28] Facilities engaged in vehicle maintenance, painting, fueling, and lubrication are included among the "industrial" facilities regulated.[29] Other regulated facilities include: hazardous waste treatment, storage, and disposal facilities; landfills and dumps that have received industrial wastes; facilities engaged in recycling (primarily metals); and steam electric power generating facilities.[30] Finally, construction activities involving the disturbance of more than five acres of land also are subject to the new regulations.[31]

Installations with facilities engaged in regulated industrial activities will have to seek coverage under a "promulgated storm water general permit."[32] Otherwise, they must apply for either an individual permit[33] or a "group application permit."[34] Installations first should determine if their regulated facilities qualify under a general permit issued by EPA or an authorized state. Qualifying under a general permit allows an installation to avoid completely the time consuming and expensive individual permit process.

Installations with regulated industrial facilities that are not connected to a separate[35] municipal storm water sewer system must seek an individual permit.[36] Individual permit applications must be filed with the EPA by November 18, 1991.[37] Installations in states with NPDES permitting authority should check with state regulators to determine applicable state-imposed deadlines.[38]

Installations not automatically required to seek an individual permit should determine if inclusion in a group

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[24] H.R. 1113, 101st Cong., 2d Sess., 136 Cong. Rec. H9605 (daily ed. Oct. 15, 1990).

[25] 55 Fed. Reg. 47990 (1990) (to be codified at various sections of 40 C.F.R. part 122).

[26] 33 U.S.C. § 1342(p) (1988).

[27] The word "directly" is somewhat misleading. For example, water from a parking lot adjacent to a motor pool that is collected in a storm sewer would be subject to regulation.

[28] 40 Fed. Reg. 48065 (1990) (to be codified at 40 C.F.R. § 1222.26(a)(14)).

[29] 55 Fed. Reg. 48065 (1990) (to be codified at 40 C.F.R. § 122.6(a)(14)) (this would include motor pools, but not the post exchange gas station, which is a "retail" establishment not subject to these regulations).

[30] *Id.*

[31] *Id.*

[32] *See* 40 C.F.R. § 122.28 (1989).

[33] *See* 55 Fed. Reg. 48066 (1990) (to be codified at 40 C.F.R. § 122.26(c)(1)).

[34] *See id.* at 48067 (to be codified at 40 C.F.R. § 122.26(c)(2) ("to be filed by an entity representing a group of applicants ... that are part of the same [industrial] subcategory ...").

[35] Sewer systems are either "separate" or "combined." In a separate system, storm water, primarily the result of precipitation, is collected and discharged separately from sewage. In a combined sewer system, storm water is collected together with sewage, treated, and then discharged into a "navigable water," such as a lake, river, or stream. Storm water in combined systems, however, can cause a variety of problems. Heavy rains can cause the treatment system to be overloaded, resulting in the discharge of untreated sewage from the treatment facility. Also, storm water can contain chemicals and metals harmful to the bacteria used in many sewage treatment plants, reducing these treatment facilities' effectiveness.

[36] 55 Fed. Reg. 48064 (1990) (to be codified at 40 C.F.R. § 122.26(a)(6)(i)).

[37] *Id.* at 48071 (to be codified at 40 C.F.R. § 122.26(e)(1)).

[38] Currently 38 states have NPDES permitting authority. States and territories without permitting authority are Massachusetts, Maine, New Hampshire, Florida, Louisiana, Texas, Oklahoma, New Mexico, South Dakota, Arizona, Alaska, Idaho, District of Columbia, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

permit is possible to save time and money. Initial[39] group applications must be filed by March 18, 1991.[40] Installations might also be able to add onto a previously filed group application if they request to do so by February 18, 1992.[41]

EPA Revises Asbestos Air Emission Standards

The EPA has issued revised air emission standards for asbestos.[42] These regulations, issued pursuant to section 112 of the Clean Air Act,[43] were effective November 20, 1990. The revisions impose additional requirements when buildings containing asbestos are demolished or renovated and when asbestos contaminated materials are transported for disposal.

The new standards for demolition and renovation apply to buildings containing at least 160 square feet of "regulated asbestos containing materials" (RACM).[44] Normally,[45] the EPA must be given written notice ten working days in advance of when the demolition or renovation is scheduled to begin.[46] If the renovation or demolition is delayed, the new regulations require that EPA be notified of the new scheduled removal date of the RACM.[47]

To enhance asbestos emission control, the new regulations require that RACM be "adequately wet"[48] during demolition or removal operations.[49] If wetting operations are suspended because of freezing weather, a record keeping requirement is imposed. Temperatures must be recorded three times a day.[50] These records must be available for inspection at the demolition or renovation site and retained for at least two years.[51] In addition, by November 20, 1991, a foreman level or above management representative trained in asbestos removal must be present during all RACM removal, stripping, or handling operations.[52]

RACM waste generators also will have to police the activities of asbestos waste transporters under the new regulations. Detailed waste shipment records will have to be prepared and maintained for at least two years.[53] A waste disposal site must be designated in the shipping records.[54] Generators not receiving a copy of the shipping documents, signed by an owner or operator of the designated disposal facility, within thirty-five days of shipping, are required to make inquiries with the shipper.[55] If a signed acceptance still is not received forty-five days after shipment, the generator must submit a written report detailing the situation to the state or regional EPA office responsible for asbestos emission standards.[56]

Army policy is to contract for removal of asbestos unless in-house performance adequately is justified and funded and personnel are adequately trained.[57] To avoid

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[39] Group applications involve two steps. First, an application is filed listing all group members. The regulator then examines the application and determines if all the applicants qualify for group treatment. After that determination is made, the group must file the second part of its application with the regulator within 12 months. *See* 55 Fed. Reg. 48072 (1990) (to be codified at 40 C.F.R. § 122.26(e)(2)).

[40] *Id.* at 48072 (to be codified at 40 C.F.R. § 122.26(e)(2)).

[41] *Id.*

[42] *Id.* at 48406 (to be codified at various sections of 40 C.F.R. Part 61).

[43] 42 U.S.C. § 7412 (1988).

[44] 55 Fed. Reg. 48419 (1990) (to be codified at 40 C.F.R. § 61.145).

[45] Special notification requirements exist for buildings that must be demolished under order of a state or local government because the structure is unsound and in danger of imminent collapse. Emergency and non-scheduled renovations or asbestos-containing materials (ACM) removals also have special notification procedures and requirements. *See id.* at 48420 (to be codified at 40 C.F.R. §§ 61.145(b)(3)(ii), (iii)).

[46] *Id.* at 48420 (to be codified at 40 C.F.R. § 61.145(b).

[47] *Id.* at 48420 (to be codified at 40 C.F.R. § 61.145(b)(3)(iv)).

[48] *See id.* at 48415 (to be codified at 40 C.F.R. § 61.141) ("Adequately wet means sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from the asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.").

[49] *Id.* at 48421 (to be codified at 40 C.F.R. § 61.145(c)).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 48421 (to be codified at 40 C.F.R. § 61.145(c)(8)).

[53] *Id.* at 48429 (to be codified at 40 C.F.R. § 61.150(d)(1)).

[54] *Id.*

[55] *Id.* (to be codified at 40 C.F.R. § 61.150(d)(3)).

[56] *Id.* (to be codified at 40 C.F.R. § 61.150(d)(4)).

[57] *Id.*

being fined by a state administering the asbestos emissions program or face a citizens suit for failure to follow EPA's regulations,[58] contracts for removal of asbestos should be reviewed to ensure that all notification requirements are the responsibility of the contractor. In addition, the contract should require the contractor to indemnify the United States for any fines or penalties assessed against the United States by a state for failure to make required notifications.

NEPA Analysis Under the Defense Base Closure and Realignment Acts

The Defense Base Closure and Realignment Act of 1988 (DBCRA 88)[59] established a system for approving, on a one-time basis, certain military installations for closure or realignment. A subsequent act, the Defense Base Closure and Realignment Act of 1990 (DBCRA 90),[60] established a system for closing and realigning installations every other year for the next five years. The procedures for selecting and approving the affected installations differ substantially between the two acts. Both acts, however, contain limited waivers to the requirements of the NEPA.[61]

DBCRA 88 exempted the DOD from NEPA compliance when the Secretary of Defense decided whether to accept the Base Closure Commission's recommendations concerning which bases to close or realign.[62] The requirement for NEPA compliance also was waived when the Secretary selected which installations were to receive any functions relocated from the closed or realigned installations.[63]

Under DBCRA 88, NEPA-based requirements still applied, however, to actions that implemented base closures, realignments, or relocations.[64] Moreover, mitigation of environmental impacts had to be considered at both gaining and losing installations. No requirement existed, however, to consider the need for—or the alternatives to—closure, realignment, or relocation.[65]

DBCRA 90 largely waives NEPA for all DOD actions related to base closures and realignments.[66] NEPA still applies, however, to the "process of property disposal" and to the "process of relocating functions from a military installation being closed or realigned to another military installation [selected to receive them]."[67]

DOD has interpreted DBCRA 90 to require no NEPA analysis before implementing decisions to close an installation or to realign it by transferring activities from the installation. Instead, NEPA applies only to decisions concerning the disposal of property made available for that purpose after the closure or realignment has occurred. In addition, NEPA still applies to installations gaining an activity relocated from a closed or realigned installation. This remains, however, essentially a mitigation requirement because the requirement to consider the need for the relocation or alternatives for the receiving installation is waived.[68]

If courts accept DOD's interpretation that DBCRA 90 has a broader NEPA waiver then DBCRA 88, the closure and realignment process will be expedited. In any event, the base closure and realignment process will remain a highly sensitive issue. Communities surrounding installations selected to close or to lose functions as a result of realignment quickly seize on perceived deficiencies in environmental documentation as grounds to block selected actions through litigation.[69] As a result, attorneys at major commands and installations affected by DBCRA 90 must ensure that personnel responsible for implementing the closure or realignment decisions understand when NEPA documentation is required.

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[58] Because asbestos is potentially a "hazardous air pollutant," it is regulated under the Clean Air Act. *See* 42 U.S.C. § 7412 (1988). Section 118 of the Clean Air Act requires federal facilities to comply with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." *Id.* § 7418. This broad waiver of sovereign immunity does not waive explicitly immunity for civil penalties. Accordingly, Department of Defense policy is not to pay fines assessed for Clean Air Act violations. This policy generally has been supported by the Department of Justice. It has not been well received, however, by many federal district courts that have ruled that federal facilities are subject to state penalties for violations of state air emission laws and regulations. *See, e.g.*, United States v. South Coast Air Quality Management Dist., No. CV 89-0548, 1990 WL 156833 (C.D. Cal. Oct. 16, 1990); United States v. Tennessee Air Pollution Control Bd., 31 ERC 1492 (M.D. Tenn. Mar. 2, 1990); Ohio ex. rel. Celebreze v. Department of the Air Force, No. C-2-86-0175 (S.D. Ohio Mar. 31, 1987); Alabama ex. rel. Graddick v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986).

[59] Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623-2630 (1988).

[60] Pub. L. No. 101-510, §§ 2901-2926, 104 Stat. 1808-1822 (1990).

[61] 42 U.S.C. §§ 4321-4370a (1988). NEPA requires government agencies to analyze the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." *See* 42 U.S.C. § 4332 (1988). The NEPA process is explained fully in Army Regulation 200-2, Environmental Effects of Army Actions (23 Dec. 1988).

[62] Pub. L. No. 100-526, § 204(c)(1), 102 Stat. 2626 (1988).

[63] *Id.*

[64] *Id.* § 204(c)(2).

[65] *Id.*

[66] Pub. L. No. 101-510, § 2905(c)(1), 104 Stat. 1815 (1990)

[67] *Id.* § 2905(c)(2)(A).

[68] *Id.*

[69] *See, e.g.*, Keep Hood Alive and Kicking, Inc. (KHAKI) v. Department of the Army, No. 90-166 (W.D. Tex. June 8, 1990) (challenge by local citizen group to the inactivation of the 2d Armored Division at Fort Hood).

Criminal Law Division Note

Criminal Law Division, OTJAG

Supreme Court—1990 Term, Part I

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith
Major Andrew S. Effron

On December 3, 1990, the Supreme Court, in *Minnick v. Mississippi*,[1] clarified the issues raised by *Edwards v. Arizona*[2] and its progeny concerning the reinitiation of interrogation by the police after an accused in custody has requested counsel. This article will examine the philosophical approaches taken by the majority and the dissent in *Minnick*. In addition, the article will discuss possible judicial and police reaction to these philosophical approaches, as well as questions left unanswered by the *Minnick* opinion.

In *Edwards* the Court held that a suspect, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[3] Edwards, who had been arrested by the police for robbery, burglary, and murder, was taken to a police station where he was warned of his rights in accordance with the Supreme Court's decision in *Miranda v. Arizona*.[4] He then agreed to submit to questioning. After being told that another suspect already in custody had implicated him, Edwards denied all involvement and gave a taped statement in which he presented an alibi defense. He then offered to "make a deal." The interrogating officer responded that he did not have authority to negotiate a deal, but he provided Edwards with the phone number of a county attorney. Edwards called the county attorney, but hung up after a few moments and said, "I want an attorney before making a deal." The questioning then ceased.

The next morning, two detectives who were colleagues of the officer who had questioned Edwards the previous day came to jail and asked to see Edwards. When the correctional official informed Edwards that the detectives wished to speak to him, *Edwards* replied that he did not want to talk to anybody. The guard told Edwards that "he had" to talk and then took him to meet with the detectives. Edwards then waived his *Miranda* rights and, after listening to the accomplice's tape for several minutes, agreed to make a statement. He subsequently made incriminating statements that led to his conviction.

The Supreme Court, however, overturned the conviction, ruling that the confession was inadmissible. The Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to a further police-initiated custodial interrogation even if he has been advised of his rights."[5] The Court added that "an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police."[6] In the course of explaining its holding, the Court twice emphasized the language in *Miranda* providing that once an accused requests counsel, "the interrogation must cease until an attorney is present."[7]

Chief Justice Burger concurred in the result on the grounds that the facts did not establish a voluntary waiver under the "traditional standards established in *Johnson v. Zerbst*."[8] He disapproved of the majority's restrictions on reinitiation of questioning because he did not believe that "either any constitutional standard or the holding of *Miranda* ... calls for a special rule as to how an accused in custody may waive the right to be free from interrogation."[9]

Justice Powell, who was joined by Justice Rehnquist in concurring with the result, felt that the majority's opinion was unclear and that the holding seemed to "create a new per se rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials ...."[10] Justice Powell stated that he would

[1] 48 Crim. L. Rep. (BNA) 2053 (U.S. Dec. 3, 1990).
[2] 451 U.S. 477 (1981).
[3] *Id.* at 484-85.
[4] 384 U.S. 436 (1966).
[5] *Edwards*, 451 U.S. at 484.
[6] *Id.* at 484-85.
[7] *Id.* at 485.
[8] *Id.* at 488 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
[9] *Id.* at 487.
[10] *Id.* at 489-90.

not "superimpose a new element of proof on the established doctrine of waiver of counsel."[11]

According to Justice Powell, the question of who initiated the conversation should not be the central element of the inquiry; rather, the fundamental question should be whether the suspect made a free and voluntary waiver of counsel before the interrogation began. He concluded, "If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: 'initiation.'"[12]

In a per curiam opinion in *Smith v. Illinois*,[13] the Court held that a suspect's "postrequest responses to further interrogation may not be used to cast doubt on the clarity of the initial request for counsel." The Court then restated the *Edwards* rule as follows: "[I]f the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked."[14]

In *Arizona v. Roberson*[15] the Court applied the *Edwards* rule to preclude questioning by another officer on an unrelated offense when the suspect remains in continuous custody after invoking his right to counsel. The Court placed particular emphasis on the statement in *Edwards* that once a suspect indicates his desire for counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[16] The Court reasoned that an

> unwillingness to answer any questions without the advice of counsel ... indicated that [the accused] did not feel sufficiently comfortable with the pressures of custodial interrogation without an attorney. This discomfort is precisely the state of mind that Edwards presumes to persist unless the suspect himself initiates further conversation about the investigation; unless he otherwise states ... there is no reason to assume that a suspect's state of mind is in any way investigation-specific.[17]

The United States, as *amicus curiae* in *Roberson*, suggested that a suspect in custody might have good reasons to talk to police about the offenses involved in a new investigation. The United States asserted that a suspect might want to learn what the police knew so the suspect could decide whether making a statement without the assistance of counsel would be in his or her best interest. The Court responded,

> The simple answer is that the suspect, having requested counsel, can determine how to deal with separate investigations with counsel's advice. Further, even if the police had decided temporarily not to provide counsel ... they are free to inform the suspect of the facts of the second investigation as long as the communication does not constitute interrogation....[18]

Justice Kennedy dissented, expressing concern that the majority had framed the case in terms of whether an "exception" to *Edwards* should permit questioning on a separate offense. Justice Kennedy, however, viewed it as a question of whether an "extension" of *Edwards* should prohibit such questioning. In his view, the Court's "ultimate concern in *Edwards*, and in the cases which follow it, is whether the suspect knows and understands his rights and is willing to waive them, and whether courts can be assured that coercion did not induce the waiver."[19] He added that the rule in *Edwards* was "designed to protect an accused in police custody from being badgered by police officers"[20] and that "[w]here the subsequent questioning is confined to an entirely independent investigation, there is little risk that the suspect will be badgered into submission."[21]

In Justice Kennedy's view, the majority's rule did not reflect the appropriate balance of competing interests. Accordingly, he noted,

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[11] *Id.* at 490.

[12] *Id.* at 491-92.

[13] 469 U.S. 91, 92 (1984).

[14] *Id.* at 95.

[15] 486 U.S. 675 (1988).

[16] *Id.* at 677.

[17] *Id.* at 684.

[18] *Id.* at 687.

[19] *Id.* at 689.

[20] *Id.* at 690 (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983)).

[21] *Id.* at 690.

> Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right.... By contrast with the Fourth Amendment exclusionary rule, for instance, the rule here operates even absent constitutional violation ... and we should be cautious in extending it. The Court expresses a preference for bright lines, but the line it draws here is far more restrictive than necessary to protect the interests at stake.[22]

Rather than establish a bright-line test for a preventative rule, Justice Kennedy advocated "[a]llowing authorities who conduct a separate investigation to read the suspect his *Miranda* rights and ask him whether he wishes to invoke them."[23] In rejecting a bright-line rule, Justice Kennedy stated that his approach—relying on rights warnings from officials conducting a separate investigation—"strikes an appropriate balance, which protects the suspect's freedom from coercion without unnecessarily disrupting legitimate law enforcement efforts."[24]

In *Minnick v. Mississippi* Justice Kennedy, writing for a six-justice majority, demonstrated that his dissent in *Roberson* indicated neither an aversion to bright-line tests nor a reluctance to extend the implications of *Edwards*. According to Justice Kennedy, enforcing the requirements of *Miranda* and *Edwards* required the application of a bright-line rule that, "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[25]

Minnick and a fellow prisoner escaped from a county jail in Mississippi. A day later, during a burglary of a mobile home, they killed the homeowner and his friend. Four months later, on Friday, August 22, 1986, Minnick was arrested in California on a Mississippi warrant. On the following day, two FBI agents came to the jail in San Diego to interview him. Minnick refused to meet with them, but was told that "he would have to go down or else." Prior to the interview, the FBI advised Minnick of his rights. He refused to sign a waiver form, but agreed to answer a few questions. During the course of the questioning, he said, "Come back Monday when I have a lawyer." The FBI interviewers honored this request and ceased the interrogation. After the FBI interview, an appointed attorney met with Minnick.[26]

On Monday, August 25, 1986, while Minnick was still in custody, a deputy sheriff from Mississippi arrived to interview Minnick. Minnick's jailers told him that he would "have to talk" to the deputy and "could not refuse." The deputy first advised Minnick of his *Miranda* rights and then asked him to sign a waiver form. Minnick, however, refused to sign the form. The deputy then asked the defendant if he wanted to talk about what happened. Minnick replied, "It's been a long time since I've seen you." The deputy then asked Minnick about his escape from the jail in Mississippi. Minnick agreed to talk about that and the conversation subsequently led into a confession about the murder.

At trial, the court rejected Minnick's motion to suppress his statements to the deputy sheriff. The Mississippi Supreme Court affirmed, holding that *Edwards* did not apply because counsel had been made available to Minnick.[27] The Supreme Court reversed the judgment, however, by holding that the right to counsel secured by the fifth amendment and *Miranda*, if invoked by a suspect, "is not terminated or suspended by consultation with counsel."[28]

Professor Yale Kamisar has noted that two surprises are present in the *Minnick* opinion.[29] First, the opinion was written by Justice Kennedy, whose dissent in *Roberson* emphasized that *Edwards* was a rule of the Supreme Court and not a constitutional command.[30] Second, the decision clearly indicates that the Court still places a significant emphasis on *Miranda*.[31]

In reaching his decision, Justice Kennedy stated that *Edwards* was meant to reinforce *Miranda* and to protect individuals from the coercive effect of custodial inter-

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[22] *Id.* at 691.

[23] *Id.*

[24] *Id.*

[25] *Minnick*, 48 Crim. Law. Rep. (BNA) at 2054.

[26] The attorney advised Minnick not to speak to anyone else about the charges against him. *See* Minnick v. State, 551 So. 2d 77, 82 (Miss. 1988). The United States Supreme Court did not refer to the content of the advice, which indicates that the content may be immaterial if the attorney is not present when the waiver is made.

[27] *Id.* at 84. The state court also rejected the sixth amendment right to counsel claim of Minnick. It noted that Minnick knew that he had a right to counsel, that he had spoken to counsel, and that he had waived counsel.

[28] *Minnick*, 48 Crim. L. Rep. (BNA) at 2054.

[29] *See* The Washington Post, Dec. 4, 1990, at A10, col. 1.

[30] *Id.*

[31] *Id.*

rogations. He noted that many advantages flow from the "clear and unequivocal" demands of *Edwards*[32] and that the case set forth a specific standard to fulfill the purposes consistent with affirming individual responsibility. Justice Kennedy also reinforced *Miranda*, citing several instances in which the Court held that once a suspect requests a lawyer, further interrogation may not proceed in the absence of counsel.[33] He recognized that ambiguities appeared in the earlier cases, but stressed that those ambiguities would be clarified by the bright-line rule established in *Minnick*.

The philosophical approach taken by the Court in *Minnick* has three elements: (1) respect for individual autonomy and human dignity;[34] (2) the need for a bright-line rule; and (3) trial accuracy. The Court did not place significant weight on issues that have been of concern in other recent Supreme Court decisions, such as the needs of law enforcement, limiting the fifth amendment to its historical meaning, and limiting the exclusionary rule to constitutional violations.

The issue of respect for individual autonomy and human dignity is reflected in two aspects of the *Minnick* case: (1) waiver of rights, and (2) the admission of guilt. As the Court has indicated in prior cases, the purpose of *Edwards* is to preserve the integrity of the suspect's choice to communicate with police only through counsel. The Court's reference to the purpose of *Edwards* reflects its view that confession is a self-destructive act that should occur only after the individual has been afforded an opportunity to discuss with counsel the dire consequences that are involved. This view also is reflected in the Court's position that the compulsory atmosphere of custodial interrogation creates the potential for obtaining a waiver by undermining the individual's sense of autonomy through badgering and overreaching.[35]

A second major theme in the *Minnick* opinion is the importance of establishing a bright-line rule that is "clear and unequivocal" in giving guidelines to law enforcement officials. The Court sought to eliminate perceived ambiguities in the prior cases by establishing a bright-line rule that precludes initiation of questioning once the suspect has requested counsel. This rule was justified on the grounds that the interests of judicial economy would be served by eliminating many "difficult determinations of voluntariness."[36]

In developing the bright-line rule, Justice Kennedy rejected the approach of the Mississippi Supreme Court, which would have permitted a second interrogation to take place after consultation with counsel. In his view, that approach was unworkable because it would require the courts to examine the extent of consultation on a case-by-case basis. He noted that consultation might consist of a telephone call, a hurried exchange in a hallway, or a lengthy conference in which the attorney gives full and adequate advice.[37] Determining whether adequate consultation occurred would be difficult and time consuming; perhaps more importantly, it could interfere with the attorney-client privilege. Moreover, relying on consultation as an exception would mean that "the suspect whose counsel is prompt would lose the protection of *Edwards*, while the one whose counsel is dilatory would not."[38]

The reliance on a bright-line rule has significant implications for future cases. The success of a bright-line rule depends on the willingness of the courts to adhere to the bright line and discourage actions that seek to carve out exceptions. If the Court is serious about the bright-line test, then law enforcement personnel should expect little sympathy for tactics, such as short breaks in custody, that seek to avoid the literal application of the *Minnick* rule.

The final element of the Court's philosophical approach involves trial accuracy. The Court long has been concerned with the effect of coercion on the reliability of confessions—not simply from a fairness point of view, but from the perspective of ensuring that the confession contains an accurate statement of the facts. Justice Kennedy's opinion for the Court in *Minnick* reflects this view, stating that "neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause."[39]

Justice Scalia, dissenting, described the *Minnick* holding as setting forth "an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any

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[32] *Minnick*, 48 Crim. L. Rep. (BNA) at 2054.

[33] *Id.* (citing *Bradshaw*, 462 U.S. at 1043; Shea v. Louisiana, 470 U.S. 51, 52 (1985); and *Roberson*, 486 U.S. at 680).

[34] *Id.* "These descriptions of *Edwards*' holding are consistent with our statement that '[p]reserving the integrity of the accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny.'" Clearly human dignity is not a custody issue.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 2055.

[38] *Id.*

[39] *Id.*

police initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney."[40] If correct, Justice Scalia's reading of the *Minnick* holding would mean that even after a suspect has been released from custody, the police could not initiate a noncustodial interrogation in the absence of counsel. Furthermore, based on the language in *Minnick* which states that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney,"[41] the Court potentially could rule in a manner consistent with Justice Scalia's reading. Such a ruling, however, is not mandated by *Minnick* because the primary focus in that opinion is on custodial interrogation. The Court specifically cited the restrictions on custodial interrogation discussed *Miranda*, *Fare v. Michael C.*,[42] and *Edwards*, noting in particular "*Edwards*' purpose to protect the suspect's right to have counsel present at custodial interrogation."[43] To date, the Supreme Court has not extended the rights under *Miranda* to a noncustodial situation, and no express statement in *Minnick* requires such an extension.

A more difficult issue raised by Justice Scalia, however, involves the length of time in which the *Minnick* prohibition against police-initiated questioning would remain in effect. Justice Scalia assumed the "perpetuality" of the majority's prohibition and noted that it would apply regardless of whether the new questioning by the police was initiated after "three months, or three years, or even three decades."[44] According to Justice Scalia, this perpetual, irrebuttable presumption not only would apply to the original crime, but also to all other crimes in which the suspect may have been involved. Eventually, the perpetuality issue will be raised when an individual who had been picked up for an offense is questioned a substantial period of time later without the presence of counsel. Would *Minnick* apply after the passing of a substantial break in custody that clearly was not a subterfuge for the purposes of avoiding the rule? What if the custody is transferred to another jurisdiction for another crime?—would an obligation arise to notify the gaining jurisdiction of the continuing request for counsel? Justice Scalia's reading of the majority opinion would suggest that *Minnick* applies to each of these situations, but a cautious reading of the majority opinion also would suggest that the prohibition continues to apply. Apparently, no room exists for an exception that would, for example, allow law enforcement officials to contact the suspect after thirty days—either orally or in writing—to see if he or she contacted an attorney. Similarly, *Minnick* evidently would not allow law enforcement officials to initiate a conversation for the purpose of informing a suspect about new evidence that might have been obtained in the case.

The police and judicial reaction to *Minnick* likely will take the following paths. Police officers may seek to entice the individual suspect to initiate a second interrogation. After a request for counsel, an investigator might say, "If you want further information let me know because I may not talk to you unless you initiate it." The police will limit the second interrogation to a noncustodial situation. They also will seek to avoid the appearance of an interrogation, relying instead on standard booking questions that do not trigger substantive fifth amendment rights. In addition, law enforcement officials could save the standard booking questions until after an invocation of a right to counsel. The police also may modify the standard rights warnings to comply with the warning at issue in *Duckworth v. Eagan*[45] by advising suspects that they are entitled to a lawyer if and when they go to court. By using this tactic, police effectively may induce suspects not to request counsel immediately.

Judicial reaction might not limit *Minnick* to custodial interrogations. Rather, when a break in custody occurs, courts still might apply the broad language in *Minnick* even though the second interrogation in *Minnick* was still custodial and occurred without a break in custody.[46] Another issue that courts may encounter is whether or not a suspect's particular comment amounts to an actual request for counsel. Although police told Minnick that he had to talk during both interrogations, a court likely would limit law enforcement officials to using only clarifying questions in a case in which the suspect made a comment that could be interpreted as a request for counsel, but in which that comment was ambiguous. Moreover, courts likely will reject any approach that would place the burden on the accused to demonstrate that an unambiguous request was made; rather, courts will presume that any indication of a request must be honored

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[40] *Id.* (emphasis in original).

[41] *Id.* at 2054.

[42] 442 U.S. 707 (1979).

[43] *Minnick*, 48 Crim. L. Rep. (BNA) at 2055.

[44] *Id.* at 2057.

[45] 109 S. Ct. 2875 (1989).

[46] *Cf.* United States v. Jordan, 29 M.J. 177 (C.M.A. 1989), *remanded*, 48 Crim. L. Rep. (BNA) 3086 (U.S. Dec. 10, 1990) (ordering reconsideration in light of *Minnick*).

and that the burden is on the police to clarify the request. Additionally, the courts probably will reject the language of Justice Powell in *Edwards*, which indicated that the police may inquire whether a suspect has changed his mind. Courts may, however, be more sympathetic to a written communication, offering to provide information at the defendant's request.

To assess *Minnick*'s impact on military practice properly, counsel must begin with an analysis of the basic hierarchy of rights.[47] The Constitution, and the Court's interpretation of the Constitution, should apply to military practice in the absence of compelling military necessity. Therefore, because they constitute the Supreme Court's dictate on how to "protect the privilege against self-incrimination guaranteed by the Fifth Amendment,"[48] *Miranda* and the *Edwards* litany prescribe rules of criminal procedure that the military must follow. To the extent that provisions of the Manual for Courts-Martial and service military justice directives are inconsistent with *Miranda* and its progeny, the Manual and directives must yield or fall.[49]

The indisputable lesson from *Minnick* is that the suspect in continued custody who has asserted the fifth amendment right to counsel may not be reinterviewed at the initiation of government agents in the absence of counsel. At a minimum, the waiver provisions of Military Rule of Evidence 305(g)(2)[50] must be amended to clarify that once an accused in custody requests counsel, further questioning may not be initiated without the presence of counsel, regardless of whether or not the accused actually has consulted with counsel. Nothing short of actual presence of counsel will support a waiver of rights pursuant to renewed government-initiated interrogation.[51] In addition, *Minnick* means that Military Rule of Evidence 305(e) provides an insufficient basis for renewed questioning when the suspect previously has asserted his fifth amendment right to counsel. Mere notice and opportunity for counsel to be present are insufficient.

Several military situations, however, do not fit squarely within a restatement of the *Minnick* rule. For instance, article 31(b) warnings[52] frequently are coupled with a right to counsel warning in military practice even though custody is not involved. Does the *Minnick* rule apply to this gratuitous right to counsel for noncustodial situations? If it does not, should military interrogators be taught to avoid custodial situations and to render only article 31(b) right-to-silence advice in custodial situations?

Another situation that is peculiar to the military occurs when a commander acts as a law enforcement official. Even if a first military interrogation is custodial, soldiers frequently are processed through the military police station and then released to their commanders. Does *Minnick* preclude a commander from subsequently asking questions in a noncustodial setting without counsel present? Could military criminal investigators simply invite the suspect to the station for a noncustodial chat without counsel being present? Another possible issue is whether or not a suspect, in conjunction with his counsel, specifically can waive the *Minnick* right to have counsel present. For example, could an accused waive the right to counsel at a polygraph examination to which the defense consented?

The government counsel must consider another question: Should the standard rights warnings be modified to avoid unintentional violations of *Edwards*, *Roberson*, and *Minnick*? Because *Roberson* applies *Edwards*—and presumably *Minnick*—to subsequent interrogations about different offenses by different interrogators, government interrogators must be aware of previous assertions of the right to counsel. Accordingly, investigators would be prudent to ask, as part of the rights warning procedure, whether the suspect previously was warned of his rights and asked for counsel. If the suspect answers in the affirmative, interrogation must cease until counsel is present.

As noted earlier, the answers counsel develop to the foregoing questions largely depend on the philosophical approach applied to the issue. The philosophical approach taken, however, will vary according to the function being performed. Government counsel are not simply advocates bound to take every step on the cutting edge of the law. A government counsel's approach to *Minnick* should reflect the function being performed by that counsel. As a trainer, trial counsel should take a conservative approach to determining the impact of *Minnick*. The trainer must focus on protecting individual rights and establishing routine procedures that are designed to ensure admissible evidence for subsequent proceedings. Similarly, when advising on the procedures to be used during a given investigation, trial counsel's advice should focus on sound procedural investigative steps. Only as an advocate, after receiving a case in completed form, should counsel push for inroads or exceptions to court decisions based on the facts of the particular case. To adopt the advocate's zeal in the training or advisory context unnecessarily endangers the potential for successful prosecution.

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[47] *See* Gilligan & Smith, *Supreme Court—1989 Term, Part II*, The Army Lawyer, May 1990, at 85, 89.

[48] *Minnick*, 48 Crim. L. Rep. (BNA) at 2053.

[49] *See* United States v. Kalscheur, 11 M.J. 373 (C.M.A. 1981) (invalidating commander's authority to delegate the power to authorize searches); *see also* Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 315(d)(2).

[50] The second sentence of Military Rule of Evidence 305(g)(2)—which purports to permit a waiver of the right to counsel after counsel (1) has been notified of a planned interview, and (2) has been given an opportunity to be present—may not overcome the holding of *Minnick* as applied to the fifth amendment right to counsel.

[51] *Minnick* addresses the fifth amendment right to counsel. What effect, if any, *Minnick* will have on the waiver provisions of the Military Rules of Evidence as applied to the sixth amendment right to counsel is unclear.

[52] 10 U.S.C.A. § 831(b) (West Supp. 1990).

Regimental News From the Desk of the Sergeant Major

Sergeant Major Carlo Roquemore

Training

This article will focus on training requirements for career progression and on available specialty schools. Presumably, the more training that soldiers receive, the more they are able to sharpen and enhance their skills. With additional training, soldiers become more versatile and are more competitive for certain career enhancing positions, promotions, and other favorable personnel actions.

Training Requirements

Part of the training process is to complete resident and nonresident courses of study. Presently, the two primary continental United States (CONUS) sites that offer military occupational specialty (MOS)-related training for our enlisted and noncommissioned officer (NCO) force are Fort Benjamin Harrison, Indiana (resident), and The Judge Advocate General's School, Charlottesville, Virginia (resident and nonresident). Of course, nothing ever stays the same. As a result of the Base Closure and Realignment Act, the 71D MOS Advanced Individual Training (AIT) Course is scheduled for relocation to Fort Jackson, South Carolina, in October 1991. The last 71D AIT course to be conducted at Fort Benjamin Harrison will begin in late September 1991 and will graduate in early December 1991. Personnel eligible to attend these courses should not be distracted by the relocation; you will be kept abreast of forthcoming changes. The proponent for all MOS-related training conducted at Fort Benjamin Harrison is The Adjutant General's School. In addition to AIT for 71D, Fort Benjamin Harrison conducts the Basic Noncommissioned Officer Course (BNCOC), the Advanced Noncommissioned Officer Course (ANCOC), and a two-week Army Reserve (USAR) and National Guard (ARNG) course designed for USAR and ARNG personnel who did not receive Initial Entry Training (IET). That course is combined with a nonresident correspondence phase to help complete the intense training requirements for the 71D MOS.

What does the Noncommissioned Officer Education System (NCOES) entail? What are the prerequisites for attendance? On entering the Army, soldiers complete IET. After IET, soldiers complete MOS-specific training and begin service in an organization. After a period of service, they become eligible for training as noncommissioned officers. NCOES provides leader and MOS skill training in residence. NCOES courses focus on tasks in the next higher level except for specific MOSs in which merger training is a consideration. Each MOS is assigned to a proponent service school that develops and maintains the individual training plan (ITP).

The first of the NCOES "levels" is the Primary Leadership Development Course (PLDC). PLDC is a non-MOS-specific four-week leadership course conducted at regional noncommissioned officer academies (NCOA) in CONUS and overseas. PLDC for Reserve component (RC) soldiers is conducted by United States Army Reserve Forces (USARF) schools, ARNG academies, and regional training centers. The primary prerequisite for this level of training is that the soldier must be a promotable specialist or corporal, a specialist or corporal in a leadership position, or a sergeant.

BNCOC emphasizes MOS-related and common core tasks that enhance prior training received at the PLDC. Training is aimed at the soldier's first opportunity for supervision. Combat support and combat service support soldiers attend BNCOC conducted in a live-in environment. Course length varies by MOS. Local commanders are permitted to conduct a one-week add-on to the program of instruction for the purpose of addressing unique unit requirements. The United States Total Army Personnel Command (PERSCOM) manages selection using an automated system. This system allows PERSCOM to nominate the most qualified soldiers provided by the enlisted master file (EMF) every quarter to the Army Training Requirements and Resources Systems (ATRRS) on all soldiers in the ranks of promotable specialist or corporal, sergeant, and staff sergeant. A search of the EMF will provide the system with all the relevant data needed for selection. For both BNCOC and ANCOC, relevant data include skill qualification scores, evaluation reports, time in service, time in grade, completion of PLDC, and compliance with physical fitness and weight standards. Based on the attendance priorities, ATRRS will develop an Army-wide order of merit list (OML) and distribute quotas to the major area commands (MACOM) equally. PERSCOM then provides the unit commanders with a candidate list based on distribution guidance from the MACOM to attend training. The prerequisites for BNCOC-RC are that the candidate must be a member of the RC, be in the grade of sergeant or staff sergeant, be able to demonstrate technical and tactical skills, and be recommended by the unit commander. Candidates also must meet weight and physical fitness standards. The above prerequisites may not be amended by local requirements, and no waivers of the grade and rank requirements are permitted.

ANCOC also is a resident course and, like BNCOC, stresses MOS-related tasks. ANCOC, however, further emphasizes tactical and advanced leadership skills. It also requires knowledge of the subjects related to training and leading soldiers at the platoon and comparable level. Training is conducted in CONUS service schools. The selection of active component students for this level of training is by a Department of the Army board. The board chooses the students annually and PERSCOM again controls class scheduling in much the same way as with the

BNCOC level students. Other selection and eligibility include:

—The Sergeant First Class/ANCOC Selection Board will evaluate personnel for attendance.

—Time-in-grade criteria will be announced by PERSCOM before each board convenes.

—Personnel selected for promotion to sergeant first class who have not previously attended ANCOC will be scheduled to attend the course.

—Candidates must meet the physical fitness and weight standards.

—Soldiers over forty must complete medical screening at the local installation before attending ANCOC and the soldier needs to handcarry a copy of the medical screen with results to the NCOA school.

—Other requirements, such as physical examinations and security clearance specific to MOS and the individual can be obtained from AR 351-4.

The Advanced Course for RC NCOs is taught in USARF schools and ARNG NCOAs. The prerequisites also include being a member of the RC in the grade of staff sergeant or sergeant first class (waivers will not be considered). The soldier must be able to demonstrate technical and tactical skills; meet height, weight, and physical fitness standards; and, finally, be recommended by the unit commander. These prerequisites may not be amended by addition of local requirements.

Why take this class? ANCOC is a prerequisite for promotion to master sergeant. The senior level of training prepares selected soldiers for master sergeant, sergeant major, and command sergeant major duties.

Enlisted Specialty Training

Enlisted specialty training offered at The Judge Advocate General's School includes both resident and nonresident courses.

Resident Instruction Program

The resident program administered by The Judge Advocate General's School will offer two courses for Active and Reserve component legal noncommissioned officers in the rank of sergeant and above with a primary MOS of 71D or 71E. The Judge Advocate General's School will provide the facilities and support for all enlisted specialty training (except AIT, BNCOC, and ANCOC). Resident course descriptions and prerequisites for attendance appear below:

1. *Law for Legal Noncommissioned Officers Course.* The Law for Legal Noncommissioned Officers Course (512-71D/E/20/30) focuses on active duty and Reserve component practice with emphasis on the client service aspects of administrative and criminal law. This course builds on the prerequisite foundation of field experience and correspondence course study. The purpose of the course is to provide essential training for legal noncommissioned officers who work as professional assistants to judge advocates. This course specifically is designed to meet the needs of skill level three training. The courses prerequisites limit attendance to active duty and Reserve component soldiers in the ranks of sergeant and staff sergeant with a primary MOS of 71D or 71E, who are working in a military legal office or whose immediate future assignment entails providing assistance to an Army attorney. Students must have served a minimum of one year in a legal position and must have satisfactorily completed the Law for Legal Specialists Correspondence Course not less than sixty days before the starting date of the course. The next course's dates are from 1 to 5 April 1991.

2. *Senior Legal Noncommissioned Officers' Management Course.* The Senior Legal NCOs' Management Course (512-71D/E/40/50) focuses on management theory and practice including leadership, leadership styles, motivation, and organizational design. Various law office management techniques are discussed, including the management of military and civilian personnel, equipment, law library, office actions and procedures, budget, and manpower. The purpose of this course is to provide increased knowledge of the administrative operations of an Army staff judge advocate office and to provide advanced concepts of effective law office management to legal noncommissioned officers. The course specifically is designed to meet the needs of skill level four and five training. The course's prerequisites limit attendance to active duty or Reserve component senior noncommissioned officers in the ranks of sergeant first class and above with a primary MOS of 71D or 71E. In addition, attendees currently must be serving as NCOICs. This requirement may be satisfied if the candidate has an immediate future assignment as the NCOIC of a staff judge advocate branch office or as a chief legal NCO of an installation, division, corps, or MACOM staff judge advocate office. The next course's dates are from 19 to 23 August 1991.

Nonresident Instruction Program

1. *The Law for Legal Specialists Correspondence Course.* The Law for Legal Specialists Correspondence Course consists of basic material in the areas of legal research, criminal law, and the organization of a staff judge advocate office. The purpose of the course is to provide the legal specialist with substantive legal knowledge for performing duties as a lawyer's assistant and to provide a foundation for resident instruction in the Law for Legal Noncommissioned Officers Course. The course's prerequisites limit attendance to enlisted soldiers

in rank of sergeant or below who have a primary MOS of 71D or 71E, to military members of other services with equivalent specialties, and to civilian employees working in a military legal office. The course contains three subcourses with a total of eighteen credit hours. Students must complete the entire course within one year from the date of enrollment.

2. *Administration and Law for Legal Noncommissioned Officers.* The Administration and Law for Legal Noncommissioned Officers Correspondence Course covers basic and advanced material in the areas of military personnel law, claims, legal assistance, staff judge advocate operations, standards of conduct, professional responsibility, and selected military common skill subjects. The purpose of the course is to prepare legal noncommissioned officers to perform or to improve technical skills in performing their duties. Attendance is limited to enlisted soldiers in the rank of staff sergeant or above who have a primary MOS of 71D or 71E. Soldiers in rank of sergeant or below, however, who have completed the Law for Legal Specialist Correspondence Course are eligible to enroll in this course. Military members of other services with equivalent specialties and civilian employees working in a military legal office also may enroll in this course as long as they previously have completed the Law for Legal Specialists Course. The course contains thirteen subcourses, with a total of seventy-nine credit hours. Students must complete the entire course within one year from the date of enrollment.

3. *Army Legal Office Administration.* The Army Legal Office Administration Correspondence Course covers advanced material in civilian personnel law, the law of federal employment, trial procedure (including pretrial and post-trial), and technical common military subjects. The purpose of this course is to prepare junior and senior noncommissioned officers to perform, or to improve their proficiency in performing, the duties involved in Army legal office administration. Enrollment is limited to enlisted soldiers in the rank of staff sergeant or above who have a primary MOS of 71D or 71E and who have completed the Administration and Law for Legal Noncommissioned Officers Correspondence Course. Military members of the other services with equivalent specialties and civilian employees working in military legal offices are eligible to enroll in this course if they previously have completed the Law for Legal Specialists Course and the Administration and Law for Legal Noncommissioned Officers Course. The course contains eighteen subcourses, with a total of 173 credit hours. Students must complete eighty credit hours the first year to maintain enrollment and complete the entire course within two years from date of enrollment.

4. *Military Paralegal Program.* The Military Paralegal Program is designed to provide highly technical training that will enable soldiers to perform specialized functions closely related to, but beyond the normal scope of, their duties. The program is a combination of resident and correspondence course studies. The purpose of this program is to provide Judge Advocate General's Corps warrant officers and noncommissioned officers with the substantive legal knowledge needed to improve proficiency in performing military paralegal duties in criminal law, administrative and civil law, legal assistance, and contract law. The course has the following prerequisites:

a) Applicant must be an active duty or Reserve component warrant officer (primary MOS 550A), or legal noncommissioned officer in the rank of sergeant or above who has a primary MOS of 71D or 71E. Applicant must have been awarded primary MOS 550A, 71D, or 71E a minimum of three years prior to date of application for enrollment. MOS 550A and 71E may include prior awarding of MOS 71D or 71E when calculating the program at this time. Military members of the other services and civilian employees of military legal offices will be considered for enrollment notwithstanding this requirement as long as they meet all of the other prerequisites.

b) Applicant must have completed a minimum of two years of college (sixty semester credit hours).

c) Applicant must have completed or received equivalent credit for specialized legal and technical training consisting of a combination of both resident and correspondence courses.

d) Correspondence Course Requirements—applicant successfully must have completed the Law for Legal Specialists Course, the Administration and Law for Legal Noncommissioned Officers Course, and the Army Legal Office Administration Course.

The Military Paralegal Program contains thirteen subcourses, with a total of ninety-six credit hours. Students must complete the entire program within one year from the date of enrollment. Applicants for enrollment in the program will complete DA Form 145, Army Correspondence Course Enrollment Application. The DA Form 145 then will be submitted to the appropriate approval authority for comment as indicated in the May 1988 edition of *The Army Lawyer*.

Independent Instruction Program

Independent enrollment is available in selected subcourses. An applicant who does not meet the eligibility requirements for enrollment in one of the judge advocate correspondence courses or who wishes to take only selected subcourses may enroll in a specific subcourse, provided the applicant's duties require the training that the particular subcourse provides. Enrollment as an independent student requires that the student complete thirty credit hours per enrollment year or complete the individual subcourse, whichever is less.

Chief Legal NCOs and other key senior NCOs are reminded that two of our primary functions as noncommissioned officers are to train and take care of enlisted soldiers. Part of that important responsibility is to ensure that soldiers are provided up-to-date information regarding the training that is available to them so they can compete with the best and be the best that they can be. This article should be made available to every legal specialist, legal NCO, and court reporter on active duty and in the Reserve component.

Personnel, Plans, and Training Note

OTJAG Personnel, Plans, and Training Office

JAGC Command and Staff College Advisory Board

The JAGC Command and Staff College (CSC) Advisory Board will convene on 17 June 1991 to recommend officers for attendance at the United States Army Command and General Staff College (USACGSC) for Academic Year 1992-93. To be eligible for consideration, judge advocates must:

(1) have credit for completing an advanced course (Military Education Level (MEL) 6); and

(2) be serving in the grade of major with more than three years' time in grade as of 1 October of the academic year in which the course begins (in this case 1 October 1992); *or* be serving in the grade of lieutenant colonel and have less than 182 months of active federal commissioned service as of 1 October of the academic year in which the course begins (in this case 1 October 1992).

Officers who want the Advisory Board to consider any new matters may submit them to:

HQDA (DAJA-PT)
ATTN: MAJ Rosen
Pentagon Room 2E443
Washington, DC 20310-2206

Because only a few judge advocates are selected for this schooling, nonselection does not indicate a lack of promotion potential or value to the Army. Officers not selected are encouraged to complete USACGSC by the correspondence course or the United States Army Reserve (USAR) nonresident program. Credit for a staff college is a prerequisite for consideration to attend senior service schools and is an important consideration for promotion to higher grades. Information concerning the correspondence course or the USAR nonresident program may be obtained by writing to:

U.S. Army Command & General Staff College
School of Corresponding Studies
ATTN: Registrar, ATZL-SWE-R
Fort Leavenworth, KS 66027

Telephonic inquiries to USACGSC concerning the correspondence course or USAR nonresident program should be directed as follows:

Autovon: 552 + extension
Commercial: 913-684 + extension—
-Last names beginning with A-E: 5584
-Last names beginning with F-K: 5615
-Last names beginning with L-R: 5618
-Last names beginning with S-Z: 5407

CLE News

1. Rescheduling of the 9th Federal Litigation Course.

The 9th Federal Litigation Course, which was scheduled for the week of 15 April 1991, has been rescheduled for the fall. The new dates will be announced later; however, a late-September or October time frame is anticipated.

2. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must con-

tact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

3. TJAGSA CLE Course Schedule

1991

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

9-13 September: Environmental Law Division Workshop (not TJAGSA sponsored—Arlington, Virginia).

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

4. Other DOD Sponsored CLE Courses

13-17 May 1991: Air Force Environmental Law Course, Maxwell Air Force Base, Alabama. This intensive course covers the entire spectrum of environmental laws and regulations. Judge advocates desiring comprehensive environmental law training should seek a course allotment in the Air Force's program. Course allotments for the Army are managed by the OTJAG Environmental Law Division. For further information contact Major Gary Perolman at AV 226-1230 or (703) 696-1230.

5. Civilian Sponsored CLE Courses

June 1991

3-7: GWU, Administration of Government Contracts, Seattle, WA.

9-14: AAJE, Sources of Law, Albuquerque, NM.

9-14: AAJE, Alternatives to Incarceration, Albuquerque, NM.

12-28: NCDA, Career Prosecutors Course, Houston, TX.

16-21: NJC, Traffic Court Proceedings, Reno, NV.

16-28: NJC, Special Court Jurisdiction—Law School Trained, Reno, NV.

16-28: NJC, Special Court Jurisdiction, Reno, NV.

18-20: ESI, International Contracting, Arlington, VA.

18-21: ESI, The Winning Proposal, Aspen, CO.

19: ESI, Protests, Denver, CO. 23-28: NJC, Court Administration for Trial Court Judges, and Administrators; Washington, D.C.

23-28: NJC, Administrative Law: Advanced, Reno, NV.

23-28: AAJE, Civil Litigation: Process, Problems, and Recent Developments; Orlando, FL.

27-29: NJC, Individual and Society, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1991 issue of *The Army Lawyer.*

6. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1991 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose

organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and The Army Lawyer will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

*AD A229148 Government Contract Law Deskbook Vol. 1/ADK-CAC-1-90-1 (194 pgs).

*AD A229149 Government Contract Law Deskbook, Vol. 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135492 Legal Assistance Consumer Law Guide/JAGS-A-89-3 (609 pgs).

AD A226160 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (85 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).

AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).

*AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

*AD A229781 Legal Assistance Guide: Family Law/ACIL-ST-263-90

Administrative and Civil Law

AD B139524 Government Information Practices/JAGS-A-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-A-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-C-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-C-89-1 (205 pgs).

AD B135459 Senior Officers Legal Orientation/JAGS-C-89-2 (225 pgs).

AD B137070 Criminal Law, Unauthorized Absences/JAGS-C-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-C-89-4 (43 pgs).

AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-C-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 11-2	Internal Management Control	14 Sep 90
CIR 611-90-2	Implementation of Changes to the Military Occupational Classification and Structure	19 Oct 90
UPDATE 16	Enlisted Ranks Personnel	10 Oct 90
UPDATE 14	Officer Ranks Personnel	17 Sep 90
UPDATE 15	All Ranks Personnel	1 Oct 90
UPDATE 16	Morale, Welfare, and Recreation	10 Oct 90
	Manual for Courts-Martial, United States, 1984, Change 4	15 Nov 90
	DOD Entitlement Manual, Change 20	6 Jul 90

3. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. The Army Lawyer will publish information on new publications and materials as they become available through the OTJAG BBS.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6-plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, The Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are Autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

By Order of the Secretary of the Army:

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